TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. [illegible] 156

JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON & COMPANY, OWNERS OF THE CARGO OF SAID STEAMSHIP, APPELLANTS,

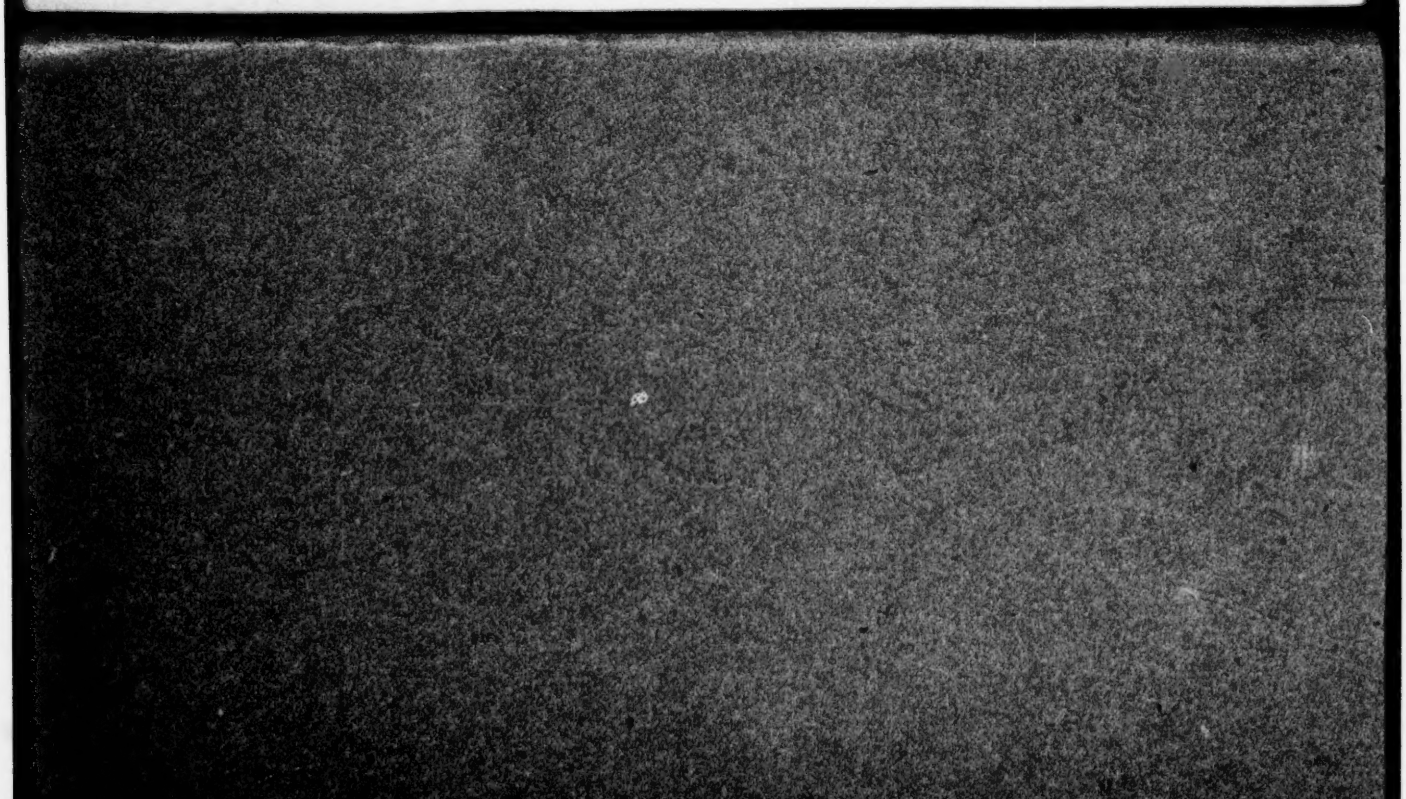
vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED NOVEMBER 2, 1896.

(17,181.)



(17,181.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 596.

JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON & COMPANY, OWNERS OF THE CARGO OF SAID STEAMSHIP, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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a *Transcript of Record.*

UNITED STATES OF AMERICA,
District of South Carolina.

In the District Court.

At a district court of the United States for the district of South Carolina, begun and holden at the court-house, in the city of Charleston, on the 23rd day of July, in the year of our Lord one thousand eight hundred and ninety-eight, and on the subsequent days, as stated in the record, before the Honorable William H. Brawley, United States judge, holding said court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

1 *Original Libel and Order for Process.*

Filed 23 July, 1898.

UNITED STATES OF AMERICA,
District of South Carolina.

In the District Court. In Admiralty.

To the Honorable William H. Brawley, judge of the district court of the United States for the district of South Carolina:

The libel of Abial Lathrop, attorney of the United States for the district of South Carolina, who libels for the United States and for all parties in interest against the ship or vessel called the Newfoundland, her tackle, apparel, furniture, and cargo, in a cause of prize, alleges:

That pursuant to instructions from the President of the United States, M. R. S. Mackenzie, of the United States Navy, in and with the United States ship of war the Mayflower, her officers and crew, did, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas, as prize of war, the said ship or vessel the Newfoundland, of 557 registered tons, with a cargo on board of the same, and commanded by Captain Frederick Malcolm, in attempting to violate the blockade which had been proclaimed by the President of the United States to exist at the port of Havana, Cuba, and which was then rendered effective by the naval forces of the United States, and that the said ship and cargo have been brought into this port and harbor of Charleston, in the State of South Carolina, where the same now are, within the jurisdiction of this court, and that the said vessel and cargo are lawful prize of war and subject to be condemned and forfeited to the United States as such.

2 Wherefore the said attorney prays that all persons having or claiming any interest in said vessel or cargo may by the proper process of this court be duly notified of the allegations and

prayer of this libel and called to appear and claim the same, that the nature, amount, and value of said cargo may be determined, and that, on proper proofs being taken and heard and all due proceedings being had, the said vessel, the Newfoundland, together with her tackle, apparel, furniture, and cargo, may, on the final hearing of this cause, by the definitive sentence and decree of this court, be condemned, forfeited, and sold as prize of war and the proceeds distributed according to law.

ABIAL LATHROP,
United States Attorney.

Let monition and attachment issue, returnable August eighth (8th August), 1898.

WM. H. BRAWLEY, *U. S. Judge.*

23 July, 1898.

3 *Warrant of Arrest.*

Filed 23 July, 1898.

THE UNITED STATES OF AMERICA, }
South Carolina District. }

In the Court of Admiralty of the United States of America for South Carolina District.

The United States of America to the marshal of the court of admiralty for the district aforesaid or to his lawful deputy, Greeting:

You are hereby commanded without delay to arrest the ship Newfoundland and her cargo, in whose possession soever [L. S.] the same may be found within the jurisdiction of this said court, and to cite the owners of the said ship "Newfoundland" and of her cargo, and all other persons whomsoever having or pretending to have any right, title, claim, or interest therein, to be and appear before the Hon. Wm. H. Brawley, the judge of the said court, at the court house, in Charleston, on Monday, 8th August, 1898, to answer the libel of the United States in a certain cause of admiralty jurisdiction.

Witness Hon. W. H. Brawley, judge of the court, at Charleston, the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-eight, and of the sovereignty and Independence of the United States of America the 123rd year.

ABIAL LATHROP,
U. S. Attorney, Libellant's Proctor.

[Seal United States District Court, Eastern District So. Ca.]

C. J. C. HUTSON,
C. D. C. U. S., S. C.

Return on Warrant.

E. B. Sligh, office deputy U. S. marshal, being duly sworn, says that on 23rd July, 1898, at Charleston, S. C., he attached the within-named vessel, and that he served the within warrant by delivering a copy of same to F. N. Malcolm, master of said vessel, and that he posted copies on the said vessel and on the court-house door.

E. B. SLIGH, *Office D. M.*

Sworn to before me July 23, 1898.

RICHARD W. HUTSON,
Dep. C., D. C. U. S., S. C.

4 *Monition.*

Filed 23 July, 1898.

UNITED STATES OF AMERICA,
Eastern District of South Carolina, In Admiralty, } *ss:*

The President of the United States of America to the marshal of the district of South Carolina, Greeting:

Whereas a libel hath been filed in the district court of the United States for the eastern district of South Carolina on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-eight, by the United States against the ship "Newfoundland," her tackle, apparel, and furniture and cargo, in a cause of prize, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court on that behalf to be made, and that all persons interested in the said ship or vessel, her tackle, &c., and cargo, may be cited in general and special to answer the premises, and, all proceedings being had, that the said ship or vessel, her tackle, &c., and cargo, may, for the causes in said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore commanded to attach the said ship or vessel, her tackle, &c., and cargo, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be condemned and sold, pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the eastern district of South Carolina, on Monday, the eighth day of August next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf; and what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Hon. Wm. H. Brawley, judge of the said court, at

the city of Charleston, in said district, this twenty-third day of July, A. D. 1898.

[L. S.] ABIAL LATHROP,
United States Attorney, Proctor for Libellant.

[Seal United States District Court, Eastern District So. Ca.]

C. J. C. HUTSON,
C. D. C. U. S., S. C.

Return on Monition.

E. B. Sligh, office deputy U. S. marshal, being duly sworn, says that on 23rd July, 1898, at Charleston, S. C., he attached the within-named vessel, and that he served the within monition by delivering a copy of same to F. N. Malcolm, master of said vessel, and that he posted copies on the said vessel and on the court-house door.

E. B. SLIGH,
Office D. M.

Sworn to before me July 23, 1898.

RICHARD W. HUTSON,
Dep. C., D. C. U. S., S. C.

5 *Answer of James A. Farquhar to Original Libel.*

Filed Aug. 8, 1898.

District Court of the United States, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
against
THE STEAMSHIP NEWFOUNDLAND and HER CARGO. } In Prize.

Answer of James A. Farquhar, owner of steamship Newfoundland.

To the Honorable Wm. H. Brawley, district judge of the United States of America for the district of South Carolina:

The answer of James A. Farquhar, of Halifax, Nova Scotia, in the dominion of Canada, intervening for his interest in the steamship "Newfoundland," to the libel of the United States of America, answers and alleges as follows:

First. That this respondent is ignorant of the instructions from the President of the United States under which it is said M. R. S. MacKensie, alleged to be of the United States Navy, in and with the United States ship of war Mayflower, her officers and crew, did, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas, as prize of war, the ship or vessel called the Newfoundland, of 557 registered tons, with a cargo on board of the same, and commanded by Captain Frederick Malcolm, but respondent admits that said seizure and capture was made on the date named and on the

high seas of said vessel with a cargo on board; that said ship is called the Newfoundland and is of 567.8 registered tons, and
6 was at the time of said capture commanded by Captain Frederick N. Malcolm, and that the ship so captured was claimed to have been seized as prize of war.

This respondent denies on information and belief that said ship and her cargo or either of them are or were ever lawful prize of war, and denies on information and belief that said ship was captured in attempting to violate the blockade which had been proclaimad by the President of the United States to exist at the port of Havana, Cuba, as is alleged in the said libel, such information being derived from the statements to this respondent of Messrs. Musgrave & Co., the charterers of said steamship, and of Captain Frederick N. Malcolm, master of the said ship; and of his own knowledge, as owner, respondent denies that there was any intention on his part in appointing Frederick N. Malcolm master of said steamship, in chartering said steamship to Musgrave and Company, or in permitting her to sail from Halifax under his charter-party, or in any other matter or thing said or done by respondent, to have said steamship violate the law of nations or to run the blockade proclaimed by the President of the United States as to the ports of Cuba; and, on the contrary thereof, respondent, knowing that such blockade had been proclaimed as to certain ports in the island of Cuba, stipulated in the charter-party of said steamship made with Mess. Musgrave and Company that said ship should engage only in lawful trade between Nova Scotia and ports of other countries, and deponent especially instructed and warned the said Frederick N. Malcolm not to attempt to take his ship, the said steamship Newfoundland, into any blockaded port, and from all that respondent knows and has been informed the said Frederick N. Malcom did not attempt nor
7 intend to attempt to enter the port of Havana, as charged in the libel, nor any other blockaded port whatsoever.

Second. This respondent is informed and believes it to be true that the blockaded had been proclaimed by the President of the United States to exist at the port of Havana, Cuba, but he is wholly ignorant as to whether said blockade was then rendered effective by the naval forces of the United States.

Third. This respondent admits that said ship and cargo have been brought into the port and harbor of Charleston, and that they are now there, within the jurisdiction of this court, but respondent denies that the said vessel is lawful prize of war, and denies that said vessel is subject to be condemned and forfeited to the United States as such prize of war.

Fourth. That all and singular the premises are true.

Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and to decree restitution of respondent's ship, and to allow his damages and costs to this respondent, and otherwise law and justice to administer in the premises.

THEODORE G. BARKER,
Proctor for Respondent.
J. A. FARQUHAR.

Sworn to before me, at Charleston, S. C., this 8th day of July, A. D. 1898.

D. B. GILLILAND,
Notary Public for S. C.

[SEAL.]

8 *Answer of David Robertson & Co. to Original Libel.*

Filed Aug. 8, 1898.

District Court of the United States of America, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
against
THE STEAMER NEWFOUNDLAND and HER CARGO. } In Prize.

Answer of David Robertson & Co., claimants of cargo.

To the Honorable Wm. H. Brawley, judge of the district court of the United States for the district of South Carolina:

The answer of David Robertson and Company, of Montreal, Canada, intervening for their interest in the cargo of the steamship "Newfoundland," to the libel of the United States of America, answers and alleges as follows:

First. That these respondents know nothing of the alleged instructions of the President of the United States, under which it is said M. R. S. Mackenzie, alleged to be of the United States Navy, in anwith the United States ship of war Mayflower, her officers and crew; did, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas, as prize of war, the ship or vessel called the Newfoundland, of 557 registered tons, with a cargo on board of the same, and commanded by Captain Frederick Malcolm, but respondents admits that said seizure and capture was made, on the date named and on the high seas, of said vessel with a cargo on board; that said ship is called the Newfoundland and is of 557.8 registered tons, and was at the time of said capture commanded by Captain Frederick N. Malcolm, and that the
9 ship as captured was claimed to have been seized as prize of war. These respondents deny on information and belief that said ship was captured in attempting to violate the*b* blockade which had been proclaimed by the President of the United States to exist at the port of Havana, Cuba, as is alleged in the said libel, such information being derived from the statements of Captain Frederick N. Malcolm, master of the said ship; and of their own knowledge these respondents deny that there was any intention on their part to have the said steamship or her master violate the blockade proclaimed by the President of the United States as to the ports of Cuba, and, on the contrary thereof, respondents knowing that such blockade had been proclaimed as to certain ports of the island of Cuba, and that other ports of said island had been left open and

free from blockade, had given to Captain Frederick N. Malcolm, master of said steamship Newfoundland, instructions to clear said cargo for the ports of Kingston, island of Jamaica, and of Vera Cruz, Mexico, but to enter and land said cargo at the port of Caybairien or the port of Sagua la Grande, island of Cuba, provided said ports or either of them should by him be found to be open and not blockaded, but if said ports should be found to be blockaded, to convey said cargo to the port of Kingston, island of Jamaica, and there await orders.

Respondents further say that at the time when said cargo was shipped, as they were informed and believe, the said ports of Caybairien and Sagua had not been declared to be blockaded ports.

Respondents further say that from all that respondents know and have been informed the said master of said steamship did not attempt nor intend to attempt to enter the port of Havana, as charged in the libel.

Second. These respondents are informed and believes it to
10 *to* be true that the blockade had been proclaimed by the President of the United States to exist at the port of Havana, Cuba, but they are wholly ignorant as to whether said blockade was then rendered effective by the naval forces of the United States.

Third. These respondents admit that said ship and cargo have been brought into the port and harbor of Charleston, and that they are now there, within the jurisdiction of this court, but respondents deny that the said cargo is lawful prize of war, and deny that said cargo is subject to be condemned and forfeited to the United States as such prize of war.

Fourth. That all and singular the premises are true.

Wherefore respondents pray that this honorable court would be please- to pronounce against the libel aforesaid and to decree restitution of respondent's goods, being the cargo of the said steamship Newfoundland, and to allow *them* damages and costs to these respondents and otherwise law and justice to administer in the premises.

THEODORE E. BARKER,
Proctor for Respondents.

11 DISTRICT OF SOUTH CAROLINA, }
County of Charleston. }

Frederick N. Malcolm, being sworn, says that he is master of the steamship Newfoundland, and as such the bailee of the cargo of said steamship and agent of the owners of said cargo, viz., the firm of David Robertson and Company, of Montreal, Canada; that the members of said firm are absent from the district, being, as deponent believes, all in the Dominion of Canada; that the above libel is true according to the best of his knowledge and belief.

F. N. MALCOLM.

Sworn to before me this — day of August, A. D. 1898.

D. B. GILLILAND,
Notary Public, S. C.

[SEAL.]

12 *Decree.*

Filed Aug. 15, 1898.

District Court of the United States, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
THE STEAMSHIP "NEWFOUNDLAND" and HER CARGO. } In Prize.

This cause came on to be heard on the proof taken *in preparatorio*. After argument of the district attorney on the side of the Government and of the proctor for the respondents, The Steamship and Her Cargo, the court having reached the conclusion that the testimony does not warrant an order releasing the vessel, and the evidence not being satisfactory, it is—

Ordered, adjudged, and decreed that either party have leave to take further proof as he may be advised.

In case the United States district attorney decides to take further proof on behalf of the Government, such proof shall be taken and concluded, and thereupon the respondent- shall, if so advised, take their further proof, with leave to the libellant to take further proof in reply.

Such further proof to be taken in accordance with the rules and practice of courts of admiralty and prize. The district attorney having moved to amend the libel, it is—

Ordered that the libel be amended as follows: "By striking out the words 'in attempting to violate the blockade which had been proclaimed by the President of the United States to exist at the port of Havana, Cuba, and which was then rendered effective by
13 the naval forces of the United States,'" and that the respondents have leave to amend their respective answers after receiving copies of the amended libel, served on their proctors.

WM. H. BRAWLEY,
U. S. Judge.

August 15, 1898.

14 *Opinion.*

Filed Aug. 17, 1898.

UNITED STATES OF AMERICA,
District of South Carolina.

In the District Court. In Admiralty.

THE UNITED STATES
vs.
THE "NEWFOUNDLAND." } Opinion.

BRAWLEY, *District Judge:*

The British steamship Newfoundland, Frederick N. Malcolm, master, cleared from Halifax, Nova Scotia, July 8th, 1898, for Kingston, Jamaica, and Vera Cruz, Mexico. She carried a cargo of flour, pork, corn, wheat, and canned goods shipped by David Robertson & Co. Bills of lading were issued to them for 4,386 packages for Kingston and 3,747 for Vera Cruz. These bills of lading are endorsed by them in blank. The charter-party was for a voyage of three months to ports of the United States, West Indies, Central and South America, &c., in the customary printed form, and written therein was "including open Cuban ports, no contraband of war to be shipped," and was to terminate at Halifax. Musgrave & Co. were the charterers. She was captured near Havana by the United States ship of war Mayflower and sent to the port of Charleston as prize of war, was libelled, and the testimony of the master, mate, and seamen was duly taken *in preparatorio* by the prize commissioners and the cause is now before the court upon that testimony and upon
15 the ship's papers. By the well-settled practice no other testimony can be considered upon this hearing, and it is for the court to determine whether upon such testimony alone there is sufficient ground for condemnation or discharge.

Test affidavits and answers have been filed by James A. Farquhar as claimant of the ship, and by David Robertson & Co. as claimants of the cargo.

The libel charges that the vessel was captured as prize of war "in attempting to violate the blockade at Havana," and it has been argued with much force that inasmuch as a distinct and specific charge has been articulated in the libel to which the claimants have answered, no other ground for forfeiture can be considered, upon the familiar principle that in all admiralty proceedings the decree must be *secundum allegata et probata.* As it will hereinafter appear that the decision does not turn upon it, the question will be pretermitted whether the words above quoted may not be rejected as surplusage, but it may be as well to say that the accepted form of libel in prize cases is such as states in general terms that the vessel captured is prize of war. The Empress, 8 Federal Cases, page 691; Benedict's Admiralty, page 612.

It appears from the master's testimony that he was instructed by the charterers to follow the directions of the shippers of the cargo, and he received from Robertson & Co., through the former captain, verbal instructions to clear for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba, and to enter either the port of Sagua la Grande or Caibairien, but on no account to enter any blockaded port, and if he found the ports of Sagua and Caibairien blockaded, to proceed to Kingston and wire for instructions. It seems clear from this testimony that it was the
16 intention of the shippers that the cargo was to be landed at Sagua or Caibairien, where the master was instructed that he would be met by pilots, and that Kingston and Vera Cruz were "contingent" or provisional destinations. Neither Sagua nor Caibairien were included among the Cuban ports in either of the President's proclamations notifying a blockade.

The Newfoundland sailed from Halifax on July 9th. Her speed is about 8 knots; her registered tonnage, 567 tons. She steered for the "Crooked Island passage" in the Bahamas. Passing thence into the "Old Bahama channel" and going in the direction of Sagua and Caibairien, she reached a point northwestwardly from Nuevitas, on the north coast of Cuba, where she was stopped by the United States ship of war Badger at 12.45 a. m. on Monday, July 18th. Her papers were examined by the boarding officer, who informed the master that the whole island of Cuba was blockaded, and was allowed to proceed upon her course.

The island of Jamaica lies almost due south from Nuevitas, which, being about 200 miles from the eastern end of the island of Cuba, it is contended that the Newfoundland should at that point have changed her course and proceeded eastward around Cape Maysi and thence to Kingston. This, undoubtedly, would have been the shortest course, and if Kingston was the destination the sailing westward from Nuevitas would have carried the ship many hundreds of miles out of her course. It may be here observed that on the log book kept by the mate the line at the head of each page up to and including Monday, 18th July, is "Journal from Halifax, N. S., towards Kingston and Vera Cruz." On Tuesday, 19th July, the head line is "Journal from Halifax, N. S., towards Vera Cruz and Kingston." If
17 after reaching Nuevitas there was an intention to go to Vera Cruz, the westwardly course would be the most direct. It is earnestly contended by the attorney for the Government that the sailing in the direction of Sagua and Caibairien after notice by the officer of the Badger that those ports were blockaded is ground of forfeiture, and in support of such contention he cites the Vrow Johanna, 2 Rob., 91, and the Neptunus, 2 Rob., 92. These cases are sufficient authority to the point that the act of sailing for a blockaded port after receiving notification of the blockade is a breach of the blockade. These were cases of blockade by notification. Sir William Scott, in the Neptunus, says, "In the case of a blockade *de facto* only it may be otherwise." In case of a blockade by notification he says, "It is to be presumed that the notification

will be formally revoked, and until that is done the port is to be considered as closed up, and from the moment of quitting to sail on such a destination the offence of violating the blockade is complete and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to continuance, and the ignorance of a party may be admitted as an excuse for sailing on a doubtful and provisional destination."

In the Circassian, 2 Wall., 135, Chief Justice Chase says, "It is a well-established principle of prize law * * * that sailing from a neutral port with intent to enter a blockaded port and with knowledge of the existence of the blockade subjects the vessel, and in most cases its cargo, to capture and condemnation. We are entirely satisfied with this rule. It was established with some hesitation when sailing vessels were the only vehicles of ocean com-
18 merce; but now, when steam and electricity have made all nations neighbors and blockade-running from neutral ports seems to have been organized as a business and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights."

In the case of the Admiral, 3 Wall., 603, the ship sailed for Savannah after notice of the blockade, and was captured "near the blockaded port, and when heading for the land and when in point of fact she was in the act of entering the port."

The facts here clearly distinguish this case from that of the "Admiral," there being no testimony tending to show any attempt to enter either Sagua or Caibairien. Sailing for a blockaded port and sailing by a blockaded port are very different. No case has been cited to support the view that the sailing in the direction of a port not blockaded by notification, but which is reported to be blockaded *de facto*, is of itself without more a breach of the blockade.

Chief Justice Chase in the Circassian, page 150, takes note of the distinction between simple and public blockades. "A simple blockade may be established by a naval officer acting upon his own discretion or under the direction of superiors without governmental notification, while a public blockade is not only established in fact, but is notified by the Government directing it to other governments. In the case of a simple blockade the captors are bound to prove its existence at the time of capture, while in the case of a public blockade the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation."

To subject the Newfoundland to confiscation for passing
19 near and by the ports of Sagua and Caibairien, after he had received notice from the boarding officer of the Badger that these ports were in fact blockaded, the Government should show that the blockade as established by the naval officers on that station at Sagua and Caibairien was still in existence, and some act on the part of the Newfoundland indicating an intention to enter those ports or one of them. The record contains no testi-

mony on either point, and the contention of the Government that she should be condemned on this ground, being supported by neither proof, reason, nor authority, must fail.

Passing by Sagua and Caibairien, ports which appear on the maps as lying to the westward of the middle of the island, the Newfoundland was next boarded by the U. S. coast guard ship Hudson about 11.30 a. m., on Tuesday, July 19th, off Cardenas. Her papers were examined and she was allowed to proceed. At 6.20 p. m. of same day she was boarded by an officer of the U. S. S. Tecumseh, was warned not to approach any nearer the island of Cuba or to attempt to enter any port. This warning was entered upon the log and she was allowed to proceed, passing on in a westward course. The log contains this entry: "8.30 p. m., Havana light bearing south ten miles;" and the master's testimony is that at 10.05 p. m. a gun was fired from the Mayflower and his ship was seized at a point 21 miles north-northwest half west from Havana light.

In answer to the interrogatory, "For what reason or on what pretence was the seizure made?" the master says: "Captain Mackenzie (who commanded the Mayflower) said the ship was out of her course for either Vera Cruz or Kingston. I protested against the seizure, saying so far as I know I had not violated the blockade law. He then asked some one on board—I don't know who he was—what they had on board the Mayflower about the Newfoundland. A letter was brought to him, and after he read he told me he had information by or through the United States consul at Halifax to the effect that the Newfoundland had left Halifax with the intention of running the blockade to Cuba or Havana—I don't know for certain which—and for that reason he would have to send me in."

The testimony of the chief mate as to the time, place, and circumstances of the seizure accords with that of the master. He gives the bearing of Havana light as southeast by south half south 21 miles, and says they were about 13 or 14 miles off shore.

A typewritten sheet of paper containing the following statement by Commander Mackenzie is pasted in the log book:

U. S. S. MAYFLOWER,
OFF HAVANA, CUBA, *July* 19, 1898.

July 19, about 8.30 p. m., the Mayflower, then being about eight miles north of Morro light, Havana, started in chase of a faint light to the northward, which was only occasionally visible. The chase occasionally changed course two or three times and was finally brought to about 10.30 p. m., about 17 miles north-northwest of the Morro. She had been warned by the Tecumseh about 6 p. m. (four hours and a half before we brought her to), and previously by the Badger. She was out of her shortest course either for Jamaica or Vera Cruz, for both of which places she had clearance. The conduct of the vessel was so suspicious that I feel obliged to send her to the nearest healthy port.

M. R. S. MACKENZIE,
Commander U. S. Navy, Commanding U. S. S. Mayflower.

21 The proctor for claimant urges that this statement cannot be considered upon this hearing, which is confined to testimony of persons aboard and to the ship's papers, and the point seems to be well taken. An entry in the log of a captured ship stating the fact that the ship was boarded or warned or captured at a time stated imports verity and may be considered as so far a part of the ship's papers as to be properly cognizable upon the preliminary hearing, but inasmuch as an officer of the capturing ship could not, upon such hearing, be heard to testify concerning the circumstances of such capture and the reasons therefor, it does not seem to the court that a written statement of such character, not under oath and attached to the ship's papers, is a part thereof which, under the practice, is to be considered.

Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the Newfoundland, at the time of capture or at any other time, was heading for the port of Havana or any other port.

The cases cited by the district attorney in support of a sentence of condemnation will now be examined.

In the Circassian, 2 Wall., 151, the court says: "At the time of the capture ship and cargo were on their way to New Orleans (the blockaded port), under contract that the cargo should be discharged there and not elsewhere, and that the blockade should be forced in order to the fulfilment of that contract." The charter-party contained an express stipulation that she was to "run the blockade if so ordered by the freighters." With this charter-party was a memorandum of affreightment, by which Soubry, the agent, engages

22 "that the merchandise shall not be disembarked except at New Orleans, and to this effect he engages to force the blockade." Numerous letters were found aboard, written to correspondents in New Orleans, in which the steamer is spoken of as "loaded entirely with our products for New Orleans," as being a fast sailer and being intended "to convey to your place, New Orleans, by forcing the blockade, a very fine cargo," etc., etc., and it was also proved that at the moment of capture the captain ordered the destruction of a package of letters which the court says would be a strong circumstance, and taken in connection with others, "it irresistibly compels belief of guilty intent at the time of sailing and time of capture."

In the Cornelius, 3 Wall., 225, the court says that the master "made every effort to escape by crowding sail and running in towards the blockaded port."

The steward testified "that the master told him that he had intended to run the blockade from the first," and there were other circumstances of suspicion in the character and conduct of the charterer and supercargo, etc., etc.

In the Admiral, 3 Wall., 616, the facts have already been referred to. She was heading for the land and in the act of entering the blockaded port for which she had sailed after notice of the blockade.

In the Cheshire, 3 Wall., 233, one of the owners and a claimant

was a partner of an enemy, who resided in Savannah, and the cargo was condemned as enemy's property. The ship had run the blockade on her outward voyage; she knew of the blockade before she sailed; she was captured off Savannah, and claimed that she had called there merely for the purpose of inquiry, and the court held that the circumstances had "the appearance of a device
23 to cover up a settled purpose to elude the blockade."

The Herald, 3 Wall., 768, was a case where the vessel was captured in attempting to escape from a blockaded port, and the court, after reviewing the facts, says: "It would be difficult to make more conclusive proof of the existence of the blockade or of notice of the fact to the master of the captured vessel."

The Rising Sun, 2 Rob., 87, was an American vessel, sailing from a French port, ostensibly to Altona, but in reality bound to Guernsey. Sir William Scott says: "It is well known that although it is the ordinary form of clearing out of a belligerent country to bear an ostensible destination to a neutral port, yet no one imputes that as a fraud, nor is it considered such an act as would justly subject neutral property on board neutral ships to be molested on that account." The real question in that case was as to the effect of the spoliation of papers.

The Hurtige Hane, 2 Rob., 103, was the case of a ship actually entering a blockaded port, and the defence set up was that she went in from distress and want of water. The only question considered was as to how far such pretences could avail.

The Calypso, 2 Rob., 129, was the case of an attempt of a neutral to cover enemy's property, a case which Sir William Scott declared to be "poisoned with fraud in every vein." No question arose therein pertinent to the case now under consideration.

These are all of the cases cited by the counsel for the Government, and the pressure upon the court has been so great that it has had but little time for independent investigation. So far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts as is
24 presented in this record. How far short the cases cited fall in showing cause for condemnation, the circumstances hereinabove recited demonstrate. These circumstances do no more than create a suspicion that there was an intention to enter a Cuban port in violation of the blockade; but suspicion, however well founded, is not proof, and cannot be accepted in any court in place of evidence.

There must be some overt act denoting an attempt to do the thing forbidden, some fact in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution.

As this court has in a recent case had occasion to remark, the testimony *in preparatorio* rarely affords opportunity for such proof. From the master's testimony it appears that Commander Mackenzie informed him that he had information, through a letter from the American consul at Halifax, that the Newfoundland sailed with intention to run the blockade. The court can form no opinion as

to the probable weight of such testimony. It also appears that Commander Mackenzie thought the movements and conduct of the Newfoundland on the night of the capture suspicious. The court has personal acquaintance with Commander Mackenzie, and knows that in character, intelligence, and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof; it furnishes ground for ordering further evidence.

In the Sir William Peel, 5 Wall., 534, the Chief Justice, after stating the rule that upon the first hearing no evidence is admissible except that which comes from the ship, either in the papers or the testimony of persons found on board, says: "If upon this evidence the case is not sufficiently clear to warrant condemnation or
25 restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

An order has accordingly been entered allowing further proof, and as that will probably involve delay, an order will be entered, if moved, for the discharge of the ship and cargo upon stipulation for their value.

File this opinion.

WM. H. BRAWLEY,
U. S. Judge.

August 17th, 1898.

26 *Amended Libel.*

Filed Aug. 17, 1898.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the District Court. In Admiralty.

To the Honorable William H. Brawley, judge of the district court of the United States for the district of South Carolina:

The libel of Abial Lathrop, attorney of the United States for the district of South Carolina, who libels for the United States and for all parties in interest against the ship or vessel called the Newfoundland, her tackle, apparel, furniture, and cargo, in a cause of prize, alleges—

That, pursuant to instructions from the President of the United States, M. R. S. Mackenzie, of the United States Navy, in and with the United States ship of war the Mayflower, her officers and crew, did, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas, as prize of war, the said ship or vessel called the Newfoundland, of 557 registered tons, with a cargo on board of the same, and commanded by Captain Frederick Malcolm, and that the said ship and cargo have been brought into the port and harbor of Charleston, in the State of South Carolina, where the same now are

within the jurisdiction of this court, and that the said vessel and cargo are lawful prize of war and subject to be condemned and forfeited to the United States as such.

Wherefore the said attorney prays that all persons having or claiming any interest in said vessel or cargo may, by the
27 proper process of this court, be duly notified of the allegations and prayer of this libel, and called to appear and claim the same; that the nature, amount, and value of said cargo may be determined, and that, on proper proofs being taken and heard and all due proceedings being had, the said vessel the Newfoundland, together with her tackle, apparel, furniture, and cargo, may, on the final hearing of this cause by the definitive sentence and decree of this court, be condemned, forfeited, and sold as prize of war, and the proceeds distributed according to law.

(S'g'd) ABIAL LATHROP,
United States Attorney.

Acceptance of Service.

CHARLESTON, S. C., *Aug.* 17, 1898.

I accept service of the within amended libel.
THEODORE G. BARKER,
Proctor for Respondent.

28 *Exceptions of D. Robertson & Co. to Decrees of Aug.* 15 & 17, '98.

Filed Aug. 19, 1898.

District Court of the United States, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
against
THE STEAMSHIP NEWFOUNDLAND and HER CARGO. } In Prize.

Exceptions of respondents David Robertson and Company, owners and claimants of the cargo of the British steamship Newfoundland, to the decree of the district court filed August 15th and 17th, 1898.

The respondents David Robertson and Company, owners and claimants of the cargo of the steamship Newfoundland, except to the decree and orders of the district court in above-entitled cause on the following grounds:

First. Upon the testimony *in preparatorio* the court should have released the cargo, the evidence showing that no act or acts were done by the said owners of the cargo, British subjects and neutral as between the United States of America and the Kingdom of Spain, or were suffered by them or by their authority to be done or committed, directly or indirectly, to justify the seizure or condemnation of the vessel or cargo as prize of war.

Second. Upon the facts as found by the court the district court should have released the vessel and cargo.

Third. The proof as found by the court showed no act or acts done or committed by the master of the vessel or her owner, charterers, or freighters, in violation of the law of war or of the blockade in question, to which acts suspicious circumstance or circum-
29 stances could be attached so as justly to constitute the vessel or her cargo lawful prize of war.

Fourth. The facts established by the proofs *in preparatorio* and found by the court disclosed no ground upon which a reasonable doubt could be raised of any action rendering the vessel or cargo lawful prize of war.

Fifth. The facts established by the proofs *in preparatorio* and found by the court showed no ground upon which a reasonable doubt could be raised of intention on the part of the master or of the owner of the vessel, of the charterers of the vessel or of the owner of the cargo, to run the blockade or to enter or attempt to enter any blockaded port in the island of Cuba, or otherwise to violate the laws of war.

Sixth. In the absence of all legal proof of any ground for reasonable doubt as to the acts and intention of the master of the vessel, her owner, charterers, or freighters, and of circumstances of suspicion coupled with any hostile or unlawful act or acts, the district court had no legal foundation for refusing to order the release of the vessel and cargo.

Eighth. The district court should not, after the hearing
30 upon the libel, answer, and proofs, have entertained or granted a motion of the district attorney to amend the libel by striking out the words mentioned in the order and decree upon which allegations of the libel the issues had been made and joined and upon which arguments had been made and the hearing had.

Ninth. The district court should not, by its decree granting the leave to amend and to take further proof and allowing new pleadings to be framed, have allowed new proof to be taken thereon.

Tenth. The district court should not, by granting leave to the Government to amend its libel at or after the hearing, have allowed the captors to make a case differing from that upon which the vessel and her cargo had been taken and the respondents had been summoned to make and had made their defense.

THEODORE G. BARKER,
Proctor for Respondents.

Exceptions overruled.

WM. H. BRAWLEY, *U. S. Judge.*

Sept. 17, 1898.

31 *Exceptions of J. A. Farquhar to Decrees, Aug.* 15 & 17, '98.

Filed Aug. 19, 1898.

District Court of the United States, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
against
THE STEAMSHIP NEWFOUNDLAND and HER CARGO. } In Prize.

Exceptions of respondent James A. Farquhar, owner and claimant of the British steamship Newfoundland, to the decree of the court in above entitled cause filed the 15th and 17th days of August, 1898.

The respondent James A. Farquhar, owner and claimant of the steamship Newfoundland, excepts to the decrees and orders of the dtstrict court in above-entitled cause on the following grounds:

First. Upon the testimony *in preparatorio* the court should have released the vessel, the evidence showing that no act or acts were done or committed by the owner, a neutral British subject, or suffered by him or by his authority to be done or committed, directly or indirectly, to justify the seizure or condemnation of his vessel as lawful prize of war.

Second. Upon the facts as found by the court the district court should have released the vessel and cargo.

Third. The proof as found by the court showed no act or acts done or committed by the master of the vessel or her owner, charterers, or freighters, in violation of the laws of war or of the blockade in question, to which acts any suspicious circumstance or circumstances could be attached so as justly to constitute the vessel
32 or her cargo lawful prize of war.

Fourth. The facts established by the proofs *in preparatorio* and found by the court disclosed no ground upon which a reasonable doubt could be raised of any action rendering the vessel lawful prize of war.

The facts established by the proofs *in preparatorio* and as found by the court showed no ground upon which a reasonable doubt could be raised of intention on the part of the master or of the owner of the vessel, of the charterers of the vessel, or of the owner of the cargo, to run the blockade, or to enter or attempt to enter any blockaded port in the island of Cuba, or otherwise to violate the laws of war.

Fifth. In the absence of all legal proof of any ground for reasonable doubt as to the acts and intention of the master of the vessel, her owner, charterers, or freighters, and of circumstances of suspicion coupled with any hostile or unlawful act or acts, the district court had no legal foundation for refusing to order the release of the vessel and cargo.

Seventh. The district court should not, after the hearing upon the libel, answer, and proofs, have entertained or granted a motion of the district attorney to amend the libel by striking out the
33 words mentioned in the order and decree upon whic[h] allegations of the libel the issues had been made and join[ed] and upon which arguments had been made and the hearing had.

Eighth. The district court should not by its decree, by granting the leave to amend and to take further proof, have allowed new pleadings to be framed and new proof to be taken thereon.

Ninth. The district court should not, by granting leave to the Government to amend its libel at or after the hearing, have allowed the captors to make a case differing from that upon which the vessel and her cargo had been seized, upon which the proof *in preparatorio* had been taken and the respondent had been summoned to make and had made his defense.

THEODORE G. BARKER,
Proctor for Respondents.

Exceptions overruled.

WM. H. BRAWLEY, *U. S. Judge.*

17 Sept., 1898.

34 *Answer of J. A. Farquhar to Amended Libel.*

Filed Aug. 19, 1898.

District Court of United States, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
against
THE STEAMSHIP NEWFOUNDLAND and HER CARGO. } In Prize.

Answer of respondent James A. Farquhar to the amended libel.

To the Honorable Wm. H. Brawley, judge of the district court:

The answer of James A. Farquhar, of Halifax, Nova Scotia, intervening for his interest in the steamship Newfoundland, to the amended libel of the United States of America answers and alleges as follows:

First. Respondent reserves to himself the benefit of his exceptions, filed this day, to the decrees and orders of this court filed the 15th and 17th of August, 1898, and all further and other right of exception to the said decree and orders and to the amended libel.

Second. Respondent says that the said amended libel states no fact beyond the bare facts that M. R. S. Mackenzie, of the United States Navy, in and with the United — ship of war Mayflower, her officers and crew, did, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas as prize of war the ship or vessel called the Newfoundland, with a cargo on board the same, and

commanded by Captain Frederick Malcolm, and that the said ship and cargo have been brought into the port and harbor of Charleston, in the State of South Carolina, where the same now are
35 within the jurisdiction of this court; which facts are notorious, indisputable, and undisputed and set forth no cause of action against the said ship or her cargo or this respondent upon which issue can be made or to which respondent can interpose any plea in law.

Third. That the allegation that the said vessel and cargo are lawful prize of war is not a statement of fact, but is a statement of a mere conclusion of law to which no plea or answer can be made or framed.

Fourth. That said allegation, in not stating upon what ground or accusation of criminal act or intent, or upon what act or acts alleged to be done or committed by said master or said vessel or cargo or by the owners of either, in violation of the belligerent rights of the United States or of the laws of war, constituting said vessel and cargo or either of them lawful prize of war, libelant is proceeding, presents no issue which this respondent can meet by plea or answer, and respondent excepts thereto as wholly insufficient in law.

Fifth. That said allegation that said vessel and cargo are lawful prize of war is a mere statement of a conclusion of law, and is wholly vague and uncertain and cannot be met by plea or answer, and respondent excepts thereto as wholly insufficient in law.

Sixth. Respondent denies that said vessel and cargo and either of them are or is lawful prize of war.

Seventh. Respondent denies that the said master of the steamship Newfoundland or her owner or the owners of her cargo have cojointly or severally done or committed, or permitted to be done or committed by his or their authority any act or acts which would make said ship or her cargo lawful prize of war or legally
36 subject her or it to just condemnation as prize of war.

Eighth. That all and singular the premises are true. Wherefore respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid and to decree restitution of respondent's vessel, the Newfoundland, and to order and decree damages and costs against the captors to this respondent and otherwise law and justice to administer in the premises.

THEODORE G. BARKER,
Proctor for Respondents.

Sworn to before me at Charleston this 19th day of August, A. D. 1898.

ED. H. MOFFETT,
Notary Public for S. C.
J. A. FARQUHAR.

37 *Answer of David Robertson & Co. to Amended Libel.*

Filed Aug. 19, 1898.

District Court of the United States, District of South Carolina. In Admiralty.

THE UNITED STATES OF AMERICA
against
THE STEAMSHIP NEWFOUNDLAND and HER CARGO. } In Prize.

Answer of respondents David Robertson and Company to the amended libel.

To the Honorable Wm. H. Brawley, judge of the district court:

The answer of David Robertson and Company, of Montreal, Canada, intervening for their interest in the cargo of the steamship Newfoundland, to the amended libel of the United States of America answers and alleges as follows:

First. Respondents reserve to themselves the benefit of their exceptions filed this day to the decree and orders of this court filed the 15th and 17th of August, 1898, and all further and other right of exception to the said decree and order and to the amended libel.

Second. Respondents say that the said amended libel states no fact beyond the bare facts that M. R. S. McKenzie, of the United States Navy, in and with the United States ship of war Mayflower, her officers and crew, did, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas, as prize of war, the ship or vessel called the Newfoundland, with a cargo on board the same, and commanded by Captain Frederick Malcolm, and that the said ship and cargo have been brought into the port and harbor of
38 Charleston, in the State of South Carolina, where the same — within the jurisdiction of the court, which facts are notorious, indisputable, and undisputed, and set forth no cause of action against the said ship or her cargo or these respondents upon which issue can be made or to which respondents can interpose any plea in law.

Third. That the allegation that the said vessel and cargo are lawful prize of war is not a statement of fact, but is a statement of a mere conclusion of law, to which no plea or answer can be made or framed.

Fourth. That said allegation, in not stating upon what ground or accusation of criminal act or intent or upon what act or acts alleged to be done or committed by said master or said vessel or cargo or by the owners of either in violation of the belligerent rights of the United States or of the laws of war libelant is proceeding, constituting said vessel and cargo lawful prize of war, presents no issue which these respondents can meet by plea or answer, and respondents except thereto as wholly insufficient in law.

Fifth. That said allegation that said vessel and cargo are lawful prize of war is a mere statement of a conclusion of law and is wholly

vague and uncertain and cannot be met by plea or answer, and respondents except thereto as wholly insufficient in law.

Sixth. Respondents deny that said vessel and cargo and either of them are or is lawful prize of war.

Seventh. Respondents deny that the said master of the steamship Newfoundland or her owner or the owners of her cargo have cojointly or severally done or committed or permitted to be done or committed, by his or their authority, any act or acts which
39 would make said ship or her cargo lawful — of war or legally subject her or it to just condemnation as prize of war.

Eighth. That all and singular the premises are true.

Wherefore respondents pray that this honorable co*uld* would be pleased to pronounce against the libel aforesaid, and to decree restitution of respondents' cargo, and to order and decree damages and costs against the captors to these respondents, and otherwise law and justice to administer in the premises.

THEODORE G. BARKER,
Proctor for Respondents.

STATE OF SOUTH CAROLINA, }
County of Charleston. }

Before me personally appeared Frederick Malcolm, who, being duly sworn, says that he is master of the steamship Newfoundland, and as such is bailee of said ship and her cargo; that the owners of said cargo are Robertson and Company, who reside in Montreal, Canada, and are absent from the district; that said answer is true to the best of deponent's knowledge and belief.

F. N. MALCOLM,
Master S. S. Newfoundland.

Sworn to before me this 19th day of August, A. D. 1898, at Charleston, in said State.

GEORGE H. MOFFETT,
Notary Public for S. C.

40 *Testimony of Capt. F. N. Malcolm in Preparatorio.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

THE UNITED STATES }
vs.
THE NEWFOUNDLAND. }

Deposition of Captain Frederick Newton Malcolm, a witness produced, sworn, and examined *in preparatorio* on the 27th day of July, 1898, at the city of Charleston, S. C., on the standing interrogatories established by the district court of the United States for the district of South Carolina, said witness having been produced for the purpose of such examination by the U. S. attorney in behalf of the captors of a certain ship or vessel called the Newfoundland and her cargo.

To the 1st interrogatory deponent answers: I was born at Chev-

erie, Hants county, Nova Scotia, and I now live at # 370 Gottingen street, Halifax, N. S. I have lived there about 6 years; I won't be exact as to the time. I am a British subject and I owe allegiance to Great Britain. I am not a citizen of the United States. I am a married man and my family and wife reside at # 370 Gottingen street, Halifax.

To the 2nd: I was present at the capture and taking of the vessel.

To the 3rd: The ship was seized on July 19th. When they fired the gun it was five minutes past ten p. m. on board our ship. It was 21 miles north-northwest half west from Havana light, and the vessel was carried into Charleston, S. C. The vessel had no
41 letters or commission authorizing her to make prizes. As I said before, she had none. There were different reasons alleged, but Captain McKensey, of the Mayflower, told me the reason he sent me in was because he had been informed either by or through the U. S. consul at Halifax that the Newfoundland left Halifax with the intention of running the blockade to Cuba. He gave me other reasons, but I considered that the principal reason in my estimation. He also alleged that we had no lights out; and he also alleged that we had altered our course at different times. That is what I remember now; no other reason.

4th. Under the British colors. I can't answer that question. I don't know what colors the ship has on board. I don't think she has any other national flag but the British, but I won't be positive. We had no other colors that I know of.

5th. No resistance was made at the time of capture. One gun was fired from the Mayflower by some one on board the Mayflower to me unknown. The capture was made by the Mayflower; at that time no other ships were in sight. Our vessel was a merchantman and I can't answer for the owner's name; on the register it is Anderson, but he is not the man who put me in the ship. I don't know who owns the ship; some person by the name of Anderson; his name appears on the register as managing owner; that is as far as I know. The capturing vessel was a vessel of war. I can't tell any of the particulars about her. I know she was an American (United States) vessel of war, the Mayflower.

6th. I suppose they had. I don't know about that part of it. The capture was made by the Mayflower, and the vessel seized has never been condemned to my knowledge.

42 7th. The Newfoundland and her master was Frederick Newton Malcolm. I was appointed by James A. Farquhar, late master, in Halifax, N. S. I have known the vessel about 5 years, and I have known him personally about two years and a half, thereabouts. July 1st of the present year, in Halifax, I took possession of the ship, and the ship was delivered to me by Captain Farquhar. I live at # 370 Gottingen street, Halifax, and I have lived there about 6 years. I am not positive about the time. I was born at Cheverie, Hants county, N. S., and I am a subject of Great Britain.

8th. I can't swear to the ship's tonnage. I think 568 tons, if my

memory serves me correctly. The vessel's company numbered 22 men, all told, and 22 were actually on board of her when she was taken. I think they are nearly all British subjects; most of them belong to Newfoundland, I think. I can only say for this voyage. I don't know when the other men came on board. Some of the men in the ship now have been in her some time. I don't know how long or how many of them. The men I shipped in Halifax all came on board at the same time—no, I am wrong there. I engaged 3 men in Halifax; they deserted the ship before she sailed, and I had to engage substitutes in their place in Halifax. I don't know the date. I think it was the 4th July. I engaged 21. By that I mean I signed them on the articles. Some of the men were on the ship. The way is this: The chief officer engages his own men, the chief engineer his own men, and the steward engages his men and I sign them on; that is what I mean by engaging them, by signing them on in the shipping office.

9th. Yes; I was master of the ship. No; I hadn't any interest in the ship, goods or merchandise ladened on her, otherwise than the interest of belonging to theship.

43 10th. I have known the vessel about 5 years; the first time I remember seeing her was in Halifax, N. S.; I can't answer as to the date; I don't remember. She carried no guns. There were 22 men on board. She was Canadian build; her name was the Newfoundland, and, as far as I know, she has had that name from the time she was built. I don't know of any other name, nor heard of any.

11th. She was bound to Kingston, Jamaica. The voyage began in Halifax. I don't know where the voyage was to have ended; I cannot tell you that. The ship was chartered for 3 months. I don't know where the voyage would have ended. She was carrying general cargo at the time of the first setting out, and she had it on board at the time of her capture. Her cargo consisted chiefly of flour, and the cargo was put on board in July, 1898. I don't know of any goods being on board contraband of war.

12th. No; none. She sailed from Halifax, and she had not arrived at her port of destination when she was taken; she had not called at any intermediate ports. Her voyage began at Halifax, and, according to the charter-party, I think the ship was to be delivered to her owners again in Halifax, although I am not positive. I cannot specify the cargo. We had general cargo, consisting chiefly of flour; also 200 barrels of pork, some corn, some wheat, and some canned goods, and none of the cargo has been delivered. She sailed from Halifax July 9, 1898, at 6 a. m., and made no other port.

13th. General cargo, consisting chiefly of flour, 200 barrels of pork, some corn, some wheat, and some canned goods. The same goods were on board when she was taken; the cargo was put on board in 1898, in the month of July. I said before I can't specify it

44 exactly. I have already stated the different species; the bulk is about 3,000 barrels of flour, and some in bags. I don't know how many bags; most of it in bags. I don't know how much canned goods there was, except that there was one car-load.

14th. The owner of the vessel, as far as I know, is Anderson; I don't know his first name. The owners of the cargo, I suppose, would be the shippers, but I don't know. The cargo is shipped by Robertson & Co., of Montreal. I know that Anderson's name appears on the register as managing owner. I don't know who were the owners. I know the shippers through the charterers, Musgrave & Co. I don't know what nationality or country any of them are by birth nor where they live, and I don't know where they reside or have resided or what State or country they are citizen- and subjects of.

15th. None that I know of; I don't know anything about it; I never saw anything like that at all.

16th. The lading was first put aboard of her in Halifax, July, 1898. The shippers were Robertson & Co., of Montreal. I only know the shippers; I don't know whether they owned the cargo or not. The consignee in Kingston is Turnbull & Co. or Turner & Co.; I think Turnbull. I don't know what countrymen they are; I have no knowledge whatever about them. It depended on circumstances where the cargo was to be delivered. The ship was chartered by Musgrave & Co. in Halifax; Robertson & Co. were the shippers. I was told by the charterers, Musgrave & Co., to carry out all the orders of instructions given by the shippers. About the time the ship was loaded I received a letter from Robertson & Co. It was not sent to me, it was sent to the captain of the ship who was in her previously. I got it with instructions, saying the ship had been chartered. I am not sure whether he said by Musgrace & Co. or himself, but he informed me he was the shipper, and he said that when I got my cargo on board to proceed with all haste. I am a little ahead. He told me first to clear the ship for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba and enter either the port of Sagua or Caibaren, and there to deliver my cargo to the orders of the shippers. If those ports were blockaded when I reached there, I was not to enter. I was on no account to attempt to enter a blockaded port. In the event of said ports being blockaded, I was to proceed to Kingston and wire them for instructions. As far as I know, the cargo was to be delivered for the benefit of Robertson & Co. I don't know whether any of the laders have any interest in the goods. I don't know anything about the quality of the goods or of the quantity, except as I have stated before. I don't know anything about whether the goods, if they shall be restored at the destined ports, will belong to the same persons. In making that statement about the orders I received I omitted to mention one thing which I do now. I was to ascertain, as early as I could, if those ports were blockaded, and I ascertained from the U. S. S. Badger that they were; that is all I can remember just now. I may remember more later on.

17th. I think there were 6 signed, 3 of each. They were true bills of lading and none were signed differently from those on the vessel. I signed the bills of lading from the mate's receipts; there were no other bills of lading.

18th. I had no other documents on board the ship relating to the

ship or cargo, in connection with this voyage, except the papers which I delivered up to the prize master, who sealed them all up; those were all the documents I had, in connection with this voyage, on board the ship. I have no other papers except those I de-
46 livered up, and I never saw such paper in any one's possession at all. I never have seen any other papers.

19th. I don't remember. I couldn't do that without the chart. I would have to consult the chart to give the latitude and longitude. It was on July 19, 1898, at 10.05 p. m., ship's time, near Havana, and it was not a port of the United States. There was a charter-party signed and executed for the present voyage, between Musgrave & Co. and J. A. Farquhar, about the 1st of July. I delivered it to the prize master, and he sealed it up with the other papers. I can't repeat word for word what is in the charter-party. I will tell you as near as I remember. It was a time charter. The ship was chartered by Musgrave & Co. for 3 months, to trade between any port or ports in the Dominion of Canada, the United States, West Indies, South or Central America, to and fro, as required, including open Cuban ports, and I think there is a clause there that says—that is, those ports that have not been declared blockaded—no contraband of war to be carried, charterer to insure vessel against capture. That is as near as I get at it. It is a very long document. That is the gist of it, as far as the places are concerned. There are a lot of other things I can't remembe-. The charterers were to furnish the coal for the ship and pay all port charges.

20th. The ship's register, the articles, the official log book, the mate's log book, manifest, bills of lading, copy of charter-party, that is all I can think of now, and none of them were destroyed or attempted to be destroyed.

21st. I know, of course, that Spain was at war with the United States, and I also knew that Havana was blockaded, but I consid-
ered I was outside the blockade line. I would just like to
47 say that at 6 o'clock the same evening I was boarded by an officer from the Tecumseh, and he told me not to come any further in shore or any nearer the shore, and he endorsed that in the mate's log book. It was at Kingston, Jamaica, that I first heard of the war and also that Havana was blockaded. It was about the time that the official notice of the blockade was given. I don't know the date. I saw it in the newspapers.

22nd. The vessel neither entered or attempted to enter the port. As I have already said, we neither entered the port or attempted to enter, but we received notice not to come any nearer in shore from the boarding officer of the Tecumseh. As I have stated, the register was endorsed by the boarding officer of the U. S. S. Badger, which spoke us off Nue Vitas; he endorsed the register something like this: I hereby certify I have this day boarded and examined the papers of the steamship Newfoundland and find the same to be correct. I think that is just about it, and his name was signed, Lieutenant Titus, U. S. S. Badger, Captain Snow commanding. That is as near as I can give it. There was no notice given to me in writing of any blockade. Of course, I understood that a blockade—in fact, the lieutenent from

the Badger said to me that the whole island of Cuba was blockaded, but he did not give it to me in writing. It was blockaded from one end to the other.

23rd. The register was examined by the boarding officer of the Badger, the boarding officer from the U. S. S. Hudson, the boarding officer from the Tecumseh. Previous to her capture the register was endorsed by the boarding officer of the Badger. In the mate's log book was endorsed by the boarding officer of the Tecumseh. I have stated all that I know in connection with that endorsing.

24th. No; I know of the ship's attempting to enter no
48 blockaded port at any time after notice had been given that the port was blockaded. I know of her sailing from a blockaded port; I have been told that she did, and I have every reason to believe it was correct from the information I received. I obtained it through the papers and also from the mate of the ship now. She entered Guantanamo, but there had been no notice given of the existing blockade when she entered, but when she got in there she was told she could not land the cargo and would have to clear out of there, and she sailed from that port. That was in June; I don't know the date. The ship, as far as I understand, was chartered to carry a cargo of sugar from Guantanamo to New York, and when she went in there the naval authorities, or whoever was in charge, would not allow her to come in the harbor; she would have to proceed to sea; the harbor was blockaded—that is, as far as I know; I wasn't in the ship; I only know it from the papers and by hearsay from the mate and others. I have fully disclosed all I know.

25th. Not that I know of. The vessel has never been seized or condemned as a prize except this present seizure.

26th. I hardly know how to answer that question. I have sustained no loss except what might be loss, in my owner's estimation, from getting the ship in trouble. I have sustained no other loss personally. As I said, the owners might blame me for getting the ship in trouble. I have received no indemnity or promise of satisfaction from any damage I have sustained or may sustain from this capture.

27th. The vessel is insured; I don't know anything about the cargo. The insurance was effected in London—Lloyd's; I don't know what the premium was. It was in July, previous to our sailing from Halifax on this voyage. I don't know whether it was effected by the charterers or the shippers.

28th. It would have been—as far as I know, the cargo
49 would have been—delivered to the order of the shippers in any port. I had no authority to sell the cargo; I don't know anything about the cargo in that respect.

29. The flour, as far as I know, came from Montreal. I know it came in there on the Intercolonial R. R. The pork came the same way, and the canned goods from there; the wheat and corn in the same way.

30th. All the cargo was taken from the cars, out of the cars on

the wharf, and put on board the ship directly—no transshipping—from deep water terminus, Halifax, in July, at different dates.

31st. I know of none.

32nd. No papers were delivered out of the said vessel except the papers I have already stated that I delivered to the prize master.

33rd. The bulk has not been broken since the ship was loaded.

34th. None; there were none on board, and no officers, soldiers, or mariners secreted on board of the ship. I don't know whether we have any U. S. citizens on board or not; I think we had one; he was not secreted or confined; he was a member of the crew; there were not to his knowledge on board citizens of the United States, or Territories of the U. S., then in a state of war against the United States, its government and laws.

35th. They are all true documents on board the ship; I don't know of any — or circumstances to affect their credit. We have no pas-ports or sea briefs. I don't know anything about any passports or sea briefs. I don't know that any person on board had a passport or license or letter of safe conduct. I have signed bills of lading. I don't remember writing any letters, but I have sent a telegram advising my owner, Capt. J. A. Farquhar, at Halifax, of the seizure of the ship and particulars.

50 36th. She was steering her course towards Kingston. The course was not altered after we saw the ship until we stopped our engines. It was always directed to the course destined by the ship's papers. The course I steered followed out my instructions from Robertson & Co. The courses were in accordance with his instructions—that is, as far as my judgment goes. I wish to say that the course was not always directed towards the nearest route to Kingston. When she was seized I never measured the distance to Kingston. I don't know what it was. The course was not altered towards any other port, but the course was frequently altered. I frequently had to alter the ship's course. I couldn't tell how often. It was altered for the safe navigation of the vessel at times, and at other times to bring her nearer the port of destination. I don't know how to put that. I never altered it towards any other port—that is, with the intention of going to any other port at any other time. Her course was altered. I couldn't tell how many times. In the first place, when I left Halifax I steered out nearly a south course true, to get clear of the fog. Then I kept the ship on the course for the Crooked Island passage, intending to go down through there, but at times the sails wouldn't draw when the ship was on her course, and I kept her off at times for the sails to draw, but I didn't alter the course for anything else until we got through the Crooked Island passage. Then I altered her course for the old Bahama channel, to carry out the instructions I got from Robertson & Co., which the charterers told me to carry out. I did not alter the course for any other port at any time. I mean by that with the intention of entering any other port. The reason I altered my course when I got through the Crooked Island passage, of course I had to alter the course going through for the safe navigation of

the ship. When I got through the passage then I altered my
51 course for the old Bahama channel, endeavoring to carry out the instructions. The instructions I had were to deliver my cargo in Sagua or Caibaren, if the ports were not blockaded. The instructions I was to carry out was I was to deliver the cargo to Sagua or Caibaren. I naturally wanted to pass those ports according to my instructions; that is the reason I altered the course, as far as I understand the question. I altered it once for that reason. I did not direct my course towards those ports at any time, but I directed my course through the old Bahama channel to pass those ports, but at no time was the ship's course directed to either of the said ports. I could not tell you how often I altered the course unless I had the log book. I had to alter going through the Bahama channel to avoid certain dangers connected with the navigation of the ship. I proceeded along the coast of Cuba after I got out of the Bahama channel westward.

37th. I don't know. I don't know the time, place, or for what consideration. I don't know anything about it. I don't know and have no reason to believe that they concealed the real property. So far as I know, she belonged to the persons asserted to be the owners.

38th. There are no guns mounted on board the ship; there are two rifles. I don't know just how much ammunition, but some. She has been employed in the sealing business. There might have been a revolver or two among the crew; I have one myself, and the officers of the crew might have one or two. There were no parts of warlike arms or balls, shells, rockets, etc., or anything intended or known to be intended for military equipment. There were no belts, balls, moulds, saltpetre, nitre, camp equipages, military tools, uniforms, soldiers' clothing, or any sort of warlike or naval stores. Nothing was thrown overboard nor concealed that I know of.

52 39th. The true destination, as I believe, is Kingston, Jamaica—that is, following out the line of my instructions, the way things had turned out when I got down there, I believe the true destination was Kingston, Jamaica.

40th. The vessel did not on the voyage on which she was captured or on any other voyage sail under the convoy of any armed ship or vessel. I had no instructions to make any resistance in any way, and I had no instructions to conceal any papers or anything like that. I had instructions from my owners. I was to follow out the instructions given by Musgrave & Co. as far as they agreed with the terms of the charter-party. I was to receive a copy of the charty-party before the ship sailed. I was on no account to enter a blockaded port or to make any attempt to enter. I was also told to be very careful and not get the ship in trouble; that was about the instructions, as I reme-ber. From Musgrave & Co. the instructions were to follow out the instructions of Robertson & Co., the shippers, where such instructions were not at variance with the terms of the charter-party. Robertson & Co.'- instructions were: He intimated first he had chartered the ship, and said after the ship was loaded I would clear the ship for Kingston and Vera

Cruz; that I would proceed as fast as I could to the north side of Cuba, and there deliver my cargo to the order of the shippers. If those ports were blockaded when I got down there, I was not to attempt to enter, but to proceed to Kingston and cable him for instructions; that is as near as I remember. I am not in possession of such instructions; they are not in writing. They were sent to the other captain, and the other captain showed them to me—the late captain who was in the ship. He was in the ship when she was chartered. I joined her just recently. He was master when this document came from Robertson & Co. They are not in my possession.

53 41st. Since I have been in the ship there has been no attempt made to enter any blockaded port whatever. As I said before, I understood the ship sailed for Guantanamo before it was blockaded; just before she got there it was blockaded; when they arrived they found the port was blockaded and they were obliged to clear out. She entered the harbor of Guantanamo, but not the port. I was not on her at the time, referring to this present voyage. I was warned not to go any further inshore by the boarding officer of the Tecumseh, at 6 o'clock, to the eastward of Havana. The boarding officer warned me not to go nearer the land, and after he left the ship I hauled the ship off shore one point and kept her that way until 8 o'clock; then at 8 I kept the ship on her course again, which was not altered until the time of her seizure. The officer told me if I went any nearer inshore I might get a shell in me.

42nd. The vessel had no letters of marque or license or commission to cruise against the person or property of the citizens of the United States.

43rd. She never acted in company or concert with any armed vessels in cruising against the property of the citizens of the United States.

F. N. MALCOLM.

Sworn to and subscribed before *me* this 27 day of July, 1898.

JOHN IRWIN,
Prize Commissioner.
EDWARD McCRADY,
Prize Commissioner.
JOS. W. BARNWELL,
Prize Commissioner.

54 The following corrections and additions were made by the witness Captain Frederick Newton Malcolm upon reading over his testimony in the presence of the commissioners:

To the third interrogatory, "For what reason or on what pretence was the seizure made?" Captain McKensey said the ship was out of her course for either Vera Cruz or Kingston. I protested against the seizure, saying, so far as I knew, I had not violated the blockade law. He then asked some one on board, I don't know who he was, what they had on board the Mayflower about the Newfoundland. A

letter was brought to him and after he read — he told me he had information given by or through the United States consul at Halifax to the effect that the Newfoundland left Halifax with the intention of running the blockade to Cuba or Havana, I don't know for certain which, and for that reason he would have to send me in.

To the fifth interrogatory, "About the owners of the ship," I would like to add that I have always understood that Captain James A. Farquhar was the managing owner; I can't swear to it; I always understood he was; as far as I know, Captain Farquhar does most of the business in connection with the ship. He engaged me as master and also gave me instructions.

To the sixteenth interrogatory. "In Robertson & Co. instructions to me he said that either of the ports mentioned in his letter a pilot would be on the lookout for us. Also he expected lighters would be ready to take my cargo, that I was to hurry the discharging, working day and night, if possible. After discharging to proceed to Halifax and to report to the charterers or shippers, I am not positive which, and await instructions." The words "I was to ascertain as early as I could if those ports were blockaded," I don't
55 think on consideration that that was in the letter. I think that was in the letter of instruction from the owners.

To the seventeenth interrogatory. I have said here that those bills of lading were true bills of lading. I mean as far as the quantity and description of the cargo is concerned. As to the ports of destination, I cannot say whether they are true or not.

To the eighteenth interrogatory. I said I had no other documents on the ship relating to the ship or cargo, relating to this voyage, except those I have given. Before sailing I asked Musgrave and Company to give me a list of the blockaded ports of the island of Cuba. This is what he gave me. He told me the lines drawn on this map represented the port which the Canadian government had notice were blockaded, so I think I had better submit this map to the court. Map annexed, Exhibit "A." He also told me the ports of Guantanamo and Santiago were blockaded. He marked them with dots on the map, but the Canadian government had no official notice of such blockading up to the time of my sailing from Halifax. I would say that I have delivered this morning to the prize commissioners the certificate of inspection of the ship, which I didn't know was required. In number eighteen I further said here I never saw such paper in any one's possession; now I would state that Robertson & Company's letter of instruction I last saw in Captain Farquhar's possession.

To the twenty-fourth interrogatory. I have not said all I could to that question. I will add that I saw in the newspapers in Bermuda that the Newfoundland had attempted to enter Guantanamo while it was blockaded, a shot was fired across her bow, and no attention was paid to it by those on board the Newfoundland. Another shot was then fired, which went through the pilot-house, killing
56 the captain. That is as near as I remember. I saw in the newspaper about the previous voyage.

To the twenty-eighth interrogatory. I would also like to add that

I would have delivered the cargo to the person producing the original bills of lading.

To the thirtieth interrogatory. I would say there was no transshipping so far as I know.

To the thirty-fifth interrogatory. About the communication, I wrote a letter to my wife, which was strictly private. It passed through the marshal's hands. I mentioned the fact that the ship was seized, but no information about it, telling her not to worry.

To the thirty-sixth interrogatory. In regard to that question I would say that I saw a ship inshore, which I have every reason to believe was the Mayflower. It was before dark. The ship was not heading for us, but, if it was the Mayflower, then I altered the course after I saw her; I altered the course at eight o'clock one point. The reason I altered the course was that I had previously been steering a point off my course, and my reasons for that was I had been warned by the boarding officer of the Tecumseh not to come any nearer land. At eight o'clock I kept the ship on the course again. I am not sure that that vessel was the Mayflower, and this would not be necessary, but I added it in case it was.

To the fourtieth interrogatory. In reference to instructions from my owners—my instructions were from Captain Farquhar, who was the one I got the instructions from—was that I was to report to George E. Boak & Co., Halifax, after the ship was loaded, and ascertain from them if they had received the policy of insurance,
57 war risk. I was not to sail until they had such policy and were satisfied with it. I was also to receive a copy of the blockade law. In case of getting into trouble I was to cable to George E. Boak & Co. for instructions. These were verbal instructions I received, and again these instructions from Roberston & Co. Those instructions were in writing, but they were addressed to the late master of the ship. They were not sent to me at all. I have said here they were not in writing, and I would like also to make the same correction that I made previously in regard to Roberston and Company's instructions.

F. N. MALCOLM.

Sworn to and subscribed before us this 27th day of July, 1898.

JOHN IRWIN,
Prize Commissioner.
EDWARD McCRADY,
Prize Commissioner.
JOS. W. BARNWELL,
Prize Commissioner.

[Endorsed:] Evidence of Capt. F. N. Malcolm, master.

58 *Testimony of Albert Salkus in Preparatorio.*

UNITED STATES OF AMERICA,
District of South Carolina.

THE UNITED STATES
vs.
THE NEWFOUNDLAND.

Deposition of Albert Salkus, a witness produced, sworn, and examined *in preparatorio* on the 28 day of July, 1898, at the city of Charleston, S. C., on the standing interrogatories established by the district court of the United States for the district of South Carolina, the said witness having been produced for the purpose of such examination by the U. S. attorney in behalf of the captors of a certain ship or vessel called the Newfoundland and her cargo.

To the 1st interrogatory deponent says: I was born in Germany; Memel, North Germany. I now live at Halifax, N. S., and I have lived there since 1871. I am a subject of Novia Scotia, and I owe allegiance to Great Britain. I am not a citizen of America. I am a married man, and my wife and family reside in Halifax—77 Cornwallis street.

2nd. Yes. I was on board at the capture of the vessel; I was not on deck.

3rd. The ship was stopped about 10 o'clock at night on the 19th July, the compass lights bearing southeast by south half south about 21 miles, and she was carried into Charleston. She had no letters or commissions to make prizes, as far as I know. I have no idea on what pretence the seizure was made.

4th. The English flag. She had no other colors on board.

5th. Not the least resistance was made at the time of cap-
59 ture. One gun was fired by the American ship. The capture was made by the Mayflower, and there was no other ship in sight at the time of the capture. The vessel captured was a merchantman. I could not tell the owner. The only one I know is the managing man, Captain Farquhar. The capturing vessel was a U. S. man of war.

6th. I don't know what commission the vessel had, nor from whom. The capture was made by the Mayflower. The vessel has not been condemned, so far as I know.

7th. The vessel taken was the Newfoundland. Her captain was Capt. Malcoom; I don't know his first name; Capt. Farquhar appointed him to the command of the vessel at Halifax, N. S., on the 1st July. I have known the vessel since 1875, and I have known the present captain 4 years; Captain Farquhar appointed him to the command of the vessel on the 1st July, 1898, at Halifax, N. S., and his home is at Halifax; I don't know how long he has lived there; I don't know where he was born, or what country or State he is a subject or citizen of.

8th. 557—somewhere about that; that is her registered tonnage; the gross tonnage is 900 and some odd. 22 composed the ship's company, and all were on board; most of them are English; one French and the rest English; they all came aboard at Halifax the same time, and the master shipped and hired them in Halifax.

9th. Yes, as chief mate. I had no interest in the vessel except my monthly wages. I got $45, and, so far as I know, the rest of the men had only the same interest.

10th. I have known the vessel since 1875; I first saw her in Halifax; at that time she carried one gun; she was in the mail
60 service then, and she had to carry a gun. 22 men were aboard at the time of the capture. There was no engagement. She was of Canadian build; built in Quebec, I believe; she was called the Newfoundland, and has been called so from the time she was built; she never had any other name.

11th. She was bound to Vera Cruz or Kingston; that is all I know. The voyage began at Halifax and it was to have ended at Halifax. The principal part of the cargo was flour and some canned meats, 200 bbls. of pork and 16 tins of mineral water and some corn and wheat, 200 bags of one and 150 bags of the other, and the same was on board when she was seized. It was put aboard of her in 1898, 1st July, and finished on the 8th July. So far as I know, she had no contraband goods of war or what was prohibited by law.

12th. Not to my knowledge; she had the ordinary ship's register. We left Halifax for Vera Cruz and Kingston; the voyage began at Halifax and was to have ended at Halifax. The cargo carried was flour and provisions, as I have mentioned before, and none have been delivered so far as I know. We left Halifax on the 9th July, 1898.

13th. Flour and provisions, as I have stated before; they were put on in July, 1898. I have already stated the different articles: flour, 5,940 bags and 1,050 barrels of flour, 200 barrels of pork, and 150 sacks of wheat or corn, I am not certain which, and 200 sacks of either wheat or corn, 16 tins of mineral water, and there was, so far as I know, 2 car-loads of canned meats.

14th. I don't know the owners, so I can't tell. I don't know who they are or what they are or where they reside or have resided nor of what country or State they are subjects.

61 15th. I don't know of any bill of sale nor in whose presence such was made. I know of no engagements entered into nor of any bill of sale, and I never saw such bill of sale.

16th. She was loaded in Halifax July, 1898. I don't know the names of the owners, laders, or consignees. I don't know anything about them. The goods were to be delivered at Vera Cruz or Kingston, but I could not tell for whose real account, risk, or benefit. I don't know whether any of the laders or consignees had any interest in the goods. It was apparently good wheat flour, and the canned goods were in seemingly good condition. I supposed that the goods would belong to the persons mentioned in the bills of lading.

17th. I don't know. I did not sign nor have I seen any bills of

lading, and I don't know whether they were false or colorable. I don't know, as I never saw any of the bills of lading.

18th. I don't know anything about any papers aboard the vessel. I have never been in possession of any such papers. If any were in the ship the captain had them. I never saw or knew anything about them.

19th. I did not look at the chart at the time, but I can give the bearing of the lights: Havana light, southeast by south half south 21 miles. That is the position on July 19th, 1898, at 10.10 p. m., near Havana, and we ought to be at least 13 or 14 miles off shore. It was not a port of the United States. I don't know anything about a charter-party. It is not in my possession, and I don't know anything about it.

20th. I don't know anything about the papers on board the vessel. As I have said, to my knowledge no papers were
62 burned or destroyed or any effort made to conceal them.

21st. Yes; we knew Cuba—I mean Spain—was in war with the United States, and I knew the naval forces of the United States held such ports in a state of blockade, and the master knew it, because we were told so by the ships that passed and boarded us. We knew that part of Cuba was blockaded before we left Halifax, and when we got off of Nue Vitas the first man-of-war of the U. S. spoke us, and they told us that the whole of the coast was blockaded, and he informed the master at the same time. I don't know when it was—between Sunday and Monday before the capture—and we heard it off Matanzas. We were spoken by a little U. S. towboat, acting as a man-of-war, and they told us the whole coast was blockaded. That was the following day, and the night before the capture we were spoken again by the towboat Tecumseh, at 6 o'clock at night, and said the whole coast was blockaded, and said, If I was in your place I wouldn't go any closer in.

22nd. We made no attempt to enter any port, and never entered any. We knew the whole coast was blockaded, but we made no attempt to enter. Notice had been given us that the whole coast was blockaded, but we made no attempt to enter any port. A notice in writing had been endorsed on the ship's papers by the visiting officer from the first ship, and he stated on our register he examined the papers. I don't know what he marked in the register, and the boarding officer from the Tecumseh he marked in the log he had examined the papers, and he told us not to go near the shore. That was at 6 o'clock at night, but we never attempted to enter any port, nor did we sail or attempt to sail from any port that was blockaded.

23rd. The register and ship's papers were examined by 3 officers and endorsed. The first officer endorsed the register, and the second boarding officer endorsed none, and the third boarding officer
63 endorsed the log. I don't know the names of the officers. The last one, I think, signed his name Nickerson, from the Tecumseh. All I know of the endorsing of the log, he was aboard the ship and warned us not to go closer in shore or to attempt to enter any of the ports.

24th. I don't know of any time she entered any port of which we had notice was blockaded or or going out of it. I never heard that this ship ever came out of a blockaded port on this or any prior voyage or entered it.

25th. No; she has never been seized as a prize and carried into a port by any one.

26th. I have not received any loss as yet; no. I have not received any indemnity or satisfaction or promise of satisfaction for any part of the damage I may have sustained from this capture and detention.

27th. I don't know if the vessel and goods are insured.

28th. I don't know anything about the cargo. I don't know whether the lader was to take the chances of the market for the sale of the goods.

29th. Thr flour came from Canada, and all the rest, so far as I know, came from Canada.

30th. The cargo was taken out of the cars at one pier at Halifax in July, 1898; from the railroad pier—Government pier.

31st. I couldn't tell you. I don't know about any papers on the vessel, nor of their nature or contents.

64 32nd. There were no papers carried away, to my knowledge. I never saw any papers.

33rd. No; the bulk has never been touched from the time of the departure of the vessel from Halifax to the time of the capture.

34th. There were no passengers on board; we had no passengers, and there were no soldiers, officers, or marines secreted on board, and there were no citizens of the United States on board, and there were no citizens of any State or Territory of the United States then in a state of war or rebellion against the United States, its Government or laws, on board.

35th. I know nothing of any papers whatsoever of any kind on the ship, and I don't know whether they were false or colorable or that there was anything to affect their credit. I know nothing of passports or sea briefs, nor from whom obtained, if obtained, nor on whose oath or affirmation, nor for how long a time they were to last, nor if a duty or fee was paid for the same, nor whether any duty or fee was to be paid for the renewal, nor whether the vessel was ever in the port where such passports and sea briefs were granted. I don't know whether any persons on board had a license for safe conduct. I don't know of any invoices, bills of lading, instruments, or papers relating to the vessel and goods, about which I am now examined, in the United States or any other country, nor how they were brought into such place or country, nor in whose possession they are, nor whether they differ from any papers on board, nor in what particulars they differ. I have not written any letters or papers concerning the vessel or cargo.

36th. We were steering our course for Vera Cruz; it was
65 not altered upon the appearance of the vessel by which she was taken; her course was steered always for Vera Cruz or Kingston, to which she was destined. We were sailing towards the ports of our destination. Yes; she was sailing directly for the port of

destination from the time we left Halifax till we were captured, and we were never sailing wide of that port in any way. She was distant from Vera Cruz about 600 miles. Her course was not altered for any port except Vera Cruz; that was the only course she steered. I never heard of any other port than Vera Cruz from the time I left Halifax till we were captured.

37th. She has been sold twice. She was sold in 1888 first. She belonged to the Allen Line Co., and they sold her to the Young Allens in Montreal; they had no more use for the vessel, and she was sold and made a steam collier; she only sold for £1,000; she was a white elephant on their hands, and then she was sold in 1891 again by the Young Allens to persons for whom Captain Farquhar was managing agent at Halifax. I don't know what the consideration was then. I guess the sum has been paid, but I don't know anything about the payment or what credit was given, nor where the parties lived, except Captain Farquhar, who lives in Halifax. That sale was truly made, as far as I know, and were not for the purpose of concealing the real property. I believe if the vessel is restored she will belong to the same owners and no others.

38th. At the present time, none. There is a rifle on board and a few cartridges belonging to the rifle. There are not on board any guns, weapons, warlike arms or armament of any name or description, nor any parts of warlike arms not put together or finished, or any ammunition, fixed or unfixed, or any balls, shells, rockets, hand-grenades, flints, percussion, or any other thing known to be intended for military equipment. There were no belts, ball-moulds, saltpetre, nitre, camp equipage, military tools, uniforms, soldiers' clothing or accoutrements, or any part of them, or any sort of warlike or naval stores, and no warlike or naval stores or things were thrown overboard to prevent suspicion at the time of capture, nor were they concealed under the name of merchandise or any other colorable appellation in the ship's papers; there were no such goods on board. There is a- international law which forbids the exportation of such warlike articles above described by any private person without license, but no such warlike or naval stores were on board.

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39th. I know and believe the destination was for Vera Cruz and Kingston; that is all I know. I don't know of any other port whatever to which the ship was destined.

40th. She never sailed under any convoy or ships of war, to my knowledge, on this or any previous trip, and I know of no reason for her sailing under any convoy, nor anything about any convoy or to what country they belonged, and as we never sailed under any convoy, we never received any instructions on the subject. I have had no instructions from anybody to resist or avoid capture, nor have we refused to deliver or destroyed or concealed the vessel's papers or any other papers that might be put on board the ship; therefore I can't state the tenor of such instructions. I am not in possession of such instructions or copies thereof, and therefore I can't leave them with the commissioners to be annexed to this deposition.

41st. No; we never sailed into any port under blockade, to my knowledge, at any time. On the last voyage we sailed in
67 Guantanamo, but we were told the place was blockaded, and we left. It was taken the morning before by the United States, we were told by the visiting officers of the U. S. men-of-war; that was last month, in June, on the previous voyage. We heard of the Guantanamo blockade the day we arrived, but we were not warned and had seen nobody before such time to tell us not to enter such port. I could not say about the conversation; the officer only told us the place was taken the morning before and we could not proceed up the bay. Captain Farquhar, then master of the ship, then said he had a cargo of sugar, and they said he could not get it out under the Spanish flag, but we might get it out under the American; that was at Guantanamo. We went out then and proceeded to Porto Rico.

42nd. The vessel did not carry a commission to cruise against the persons or property of the United States and make prizes thereof, and they were not licensed or given any directions therefor in writing or otherwise. I don't know the contents thereof, as I have no knowledge whatsoever upon the subject.

43rd. The vessel did not at any time sail or act in concert with any armed vessels in cru-sing against or seizing as prizes any persons, vessels, or property of the citizens of the United States.

A. SALKUS.

Sworn to before us and subscribed before us this 29 day of July, 1898.

JOHN IRWIN,
Prize Commissioner.
EDWARD McCRADY,
Prize Commissioner.
JOS. W. BARNWELL,
Prize Commissioner.

68 *Testimony of Levi Bursey in Preparatorio.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

THE UNITED STATES }
vs.
THE NEWFOUNDLAND. }

Deposition of Levi Bursey, a witness produced, sworn, and examined *in preparatorio* on the 28th day of July, 1898, at the city of Charleston, S. C., on the standing interrogatories established by the district court of the United States for the district of South Carolina, said witness having been produced for the purpose of such examination by the U. S. attorney in behalf of the captors of a certain ship or vessel called the Newfoundland and her cargo.

Interrogatory 1st. Newfoundland, and I am a sailor and I could not tell where I lived. Newfoundland is my home when I am at

home. I am a subject or citizen of Newfoundland and I owe allegiance to Great Britain, I suppose. I don't understand that. I am not a citizen of the United States and I am not a married man.

2nd. I was on the bridge when the ship was captured.

3rd. I don't know what date. I know it was 10 o'clock at night, 4 bells. I think it was this month. I don't know myself. I heard them say we were 21 miles. I don't know where we were. I only got the course from the captain. I don't know what port I was off—the log will give that—and I forget the name of this place where the ship has been carried. I don't know whether the ship had any letters or commission to make prizes, nor from whom. I
69 don't know why they captured the vessel or the first thing about it.

4th. English; we had no other colors on board.

5th. No resistance was made; only one gun was fired from the Mayflower. I sighted no other ships. Our vessel was a merchantman. I don't know to whom she belonged. I don't know if the capturing vessel was a ship of war; they told me she was the Mayflower, of the United States.

6th. I don't know whether the capturing vessel had any commission to act in the seizure or capture of the vessel, nor from whom, but the capture, I was told, was made by the Mayflower, a United States ship. I don't know whether our ship has been condemned.

7th. The Newfoundland; I don't know any more than you what the captain's name is; it sounds like Malcolm. I didn't know him until he came on the ship. I am a stranger and so is he. I don't know who appointed him to the vessel or where. I never knew the man at all. I have known the vessel 3 years. He took possession of her in Halifax, but I don't know who delivered the ship to him. I don't know the home of the master, nor how long he has lived there, nor anything about him.

8th. I don't know the tonnage of the vessel, and I don't know that I could tell you the number of the vessel's company. I couldn't even say about how many. I don't know what countrymen they are, and I don't know what time they came on board. I know I came on board a few hours before the ship sailed; none have come on board since the ship sailed. I don't know who shipped them. I engaged with Captain Farquhar; he engaged me.

9th. Yes; as second mate. I had no interest in the ship and I don't know whether any other of the members of the ship had any or not.

70 10th. About 3 years. I saw her in Halifax about 3 years ago; she carried no guns, to my knowledge. The same crowd was on board before she was captured as now; there was no engagement entered into. I heard she was built *built* in Quebec, or somewhere about there. Her name was the Newfoundland. I don't know how long she has been so called. I don't know of any other name.

11th. I don't know. I shipped for the West Indies; that is all I know. Our voyage began at Halifax and was to have ended at Halifax. I don't know anything about her cargo. I don't know

what she had on board when taken and seized; her cargo was put on board during the present year. I don't know what month. I don't know whether she had on board any goods contraband of war or otherwise prohibited by law.

12th. I don't know; I did not see any of the papers nor know from whom they came. I shipped for the West Indies. I don't know where she was bound. I shipped from Halifax to go back to Halifax and be paid off. She went into no ports from the time of her sailing. I told you I did not know anything about the cargo, and we have not delivered any cargo at any port; she sailed from Halifax.

13th. I don't know what kind of goods the vessel had on board when she sailed and when she was taken; it was in this year the capture was made. I don't know the month. I know nothing about the cargo.

14th. I don't know who were the owners of the ves-els and goods, nor do I know how they were the owners, nor of what country they are, nor where they reside or have resided previously.

15th. I don't know anything about the bills of sale, where it was made, nor by whom, nor of any engagement entered into
71 concerning the purchase, further than what appears on the bill of sale, nor do I know what has become of it.

16th. I don't know when the cargo was put on her; it was this year. I don't know the names of the laders, owners, or consignees, nor what countrymen they are, nor anything about them. I don't know where the goods were to be delivered, nor for whose real account, risk, or benefit, and I don't know whether the said laders and consignees have any interest in the goods. I don't know anything about the quantity or qualtity of the goods, nor if they will belong to the same persons if they are restored and unladened at the destined port.

17th. I don't know how many bills of lading were signed. I don't know whether any bills of lading were false or colorable or if they were signed different in any respect from those which were on board the vessel, nor what was their contents, nor what has become of them.

18th. I have none in my possession. I don't know whether they were on board the vessel at the time of capture. I don't know of any paper to show my interest or of anybody's else in the vessel or goods. I am not in possession of any such papers. I don't know anything about such papers. I don't know in whose possession they are, and I never saw them.

19th. I couldn't state the degrees of latitude and longitude. I know she was captured in the present year, about 10 o'clock at night, in this month. I don't know what port we were near. We reckoned we were 21 miles from shore, but I don't know. I don't know whether it was a port or territory of the United States. I don't know whether any charter-party was signed or executed or by whom or when, and such is not in my possession, and I
72 don't know its contents.

20th. I don't know what papers or writings were on board

the vessel, and I don't know whether any were burnt, torn, thrown overboard, destroyed, cancelled, or attempted to be concealed.

21st. I did not know and I don't know whether the master knew at the time and place of her capture whether such place or port was in a state of war with the United States. I did not know that the naval forces of the United States held such a place in a state of blockade, and I don't know whether the master knew.

22nd. I don't know whether such port was under blockade at the time said vessel entered or attempted to enter the same; the vessel made no attempt to enter and did not enter any port. I don't know whether any notice or warning of such blockade had been given to or received by the owner, master, or commandant of said vessel, but she never attempted to enter any port. I don't know whether any notice in writing had been endorsed on the register or other ship's papers or when or by whom such notice had been endorsed of the existing blockade of such port. She never entered or attempted to enter or sailed or attempted to sail from any port on said voyage.

23rd. I don't know anything about the register of the vessel. I know we were boarded by 3 officers, I think. I don't know what they did; we kept on our course. I don't know who they were or what they did while aboard. There were two small boats. I was on deck when one came—the Tecumseh. She was the last one. I heard the men say that was her name. I don't know where
73 or off what ports they boarded the ship, and I don't know what they said or did.

24th. I don't know and never heard of the ship having at any time or times after the blockade of the said port and after notice had been given attempting to enter the blockaded port or sail therefrom without success. I don't know and have not heard of any particulars on the subject.

25th. I don't know and never heard of her having been condemned as a prize.

26th. I have suffered no loss by the taking or the seizure of the vessel, and I have never received any indemnity, satisfaction, or promise of satisfaction for any part of the damage which I may have sustained or may sustain by this capture or detention.

27th. I don't know whether the vessel or goods are insured.

28th. I don't know whether if we arrived at our destined port our cargo or any part thereof would have immediately become the property of the consignees or whether the lader was to take the chance of the market for *for* the sale of the goods.

29th. I know nothing whatever about the cargo. I never shipped until after the cargo was put on board.

30th. I saw them taking it from the wharf at Halifax. I don't know what wharf.

31st. I don't know whether there is in any country besides the United States or on board any vessel other than the one I am
74 now examined about any bills of *any bills of* lading, invoices, letters, instruments, papers, or documents relative to the said vessel or cargo, or what their nature is or their contents.

32nd. I don't know whether any papers were delivered out of

said vessel or carried away, or when or by whom or in whose custody or power they now are.

33d. I know the bulk has not been broken during the voyage or since the capture of the vessel.

34th. There were no passengers as I am aware of, and none were hidden away at the time of capture; there was no one on board but the ship's crew. I don't know whether any citizen of the United States was on board or secreted or confined at the time of the capture. To my knowledge, none such were secreted or confined at the time of capture. There was no citizen of any State or Territory of the United States on board then in a state or war or rebellion against the United States, its Government or laws.

35th. I don't know anything about passports, sea briefs, charter-parties, bills of sale, invoices, and papers found on board, nor whether they were true or false, and I know of no matter or circumstance to affect their credit, nor by whom any passports were obtained, nor from whom, nor whether they were obtained for this vessel only and upon the oath and affirmation of the persons therein described, nor whether they were delivered to or on behalf of the persons who appear to have been sworn or affirmed without their having ever in fact made such oath or affirmation, nor for how long a time they were to last, nor whether any duty or fee was payable for the same, nor whether there is any duty or fee to
75 be paid on the renewal, nor whether any passports have been renewed or how often, nor whether the vessel was in the country where these passports were granted, nor whether any person on board had any passport, letter, or license of safe conduct, nor whether there are in the United States or places or country besides the United States any bills of lading, invoices, instruments, or papers relative to the goods or vessel. I have not written or signed any letters or papers concerning the vessel or cargo.

36th. I don't know what port or place she was steering for. I heard we were going to Kingston or Vera Cruz; that is all I know about it. From the time I went on the bridge the course was not altered; before that I don't know; I was not on the bridge. As far as I know, her course was always directed towards Vera Cruz; that was the course we were going for, as far as I know. I don't know whether she was sailing before or at the time of her capture wide of her course to which she was destined by the ship's papers. I don't know how far she was from Vera Cruz or Kingston. You know a ship steering a course, she can't always steer one course; she was not altered when I was there. I only had the course given to me by the captain or mate. I don't know to what other port or place she altered her course or for what reason.

37th. I don't know anything about the ship whatever, or whether she has been sold or transferred or how often or whether the consideration has been paid or satisfied or by whom or where they live. I know nothing as to any sale or transfer, and I have no belief on the subject. As far as I know, if the vessel was restored, she would belong to the persons now said to be the owners.

76 38th. No guns were mounted—none that I know anything

of—and, so far as I know, there were no guns or ammunition, weapons, warlike arms or armament, nor any parts of warlike arms not put together or finished, or any fixed or unfixed, or any balls, shells, rockets, hand grenades, flints, percussion caps, or any other thing known to be intended for military equipment; nor were there any belts, ball mouids, saltpetre, nitre, camp equipage, military tolls, uniforms, soldiers' clothing or accoutrements, or any sort of warlike or naval stores; nor were such warlike or naval stores or things thrown overboard to prevent suspicion at the time of the capture, nor were any such things concealed under the name of merchandise or any other colorable appellation in the ship's papers, according to my knowledge. None of the above-named articles were for the sole use of any fort or garrison to which such vessel was destined. I don't know of any ordinance, placard, or law existing in such country or State forbidding the exportation of the same by private persons without license, and none such were on board by public authority.

39th. As far as I know, she was bound for Vera Cruz or Kingston.

40th. The vessel did not, on the voyage in which she was captured or any former voyage, to my knowledge, sail under the convoy of any armed ships, and I had no instructions or directions on any voyage respecting the sailing or keeping in company with such armed or convoying ship. I had no instructions to avoid escape or capture, nor for destroying or concealing or refusing to give up the vessel's documents, papers, or any other papers that might be or were put on said vessel, and I am in possession of no such instructions or copies thereof and don't know the tenor of them.

77 41st. Not as I am aware of has the vessel on this voyage or at any time or times attempted to enter any port under blockade by the arms or forces of any belligerent power. I was warned about the time the 3 ships came up. We were warned then and we kept clear. I heard no conversation at the time. I don't know what course we were steering at that time. I was not on the bridge at the time we were warned. It was not my watch.

42nd. I don't know whether the vessel I am examined about did on her last voyage prior to the seizure carry a commission or license as a privateer or letter of marque or reprisal or authority from any persons to cruise against the persons or property of the citizens of the United States and to make prizes thereof, nor by whom such authority was given, nor whether it was in writing, nor if it remained with the vessel up to the time of her capture or was destroyed or concealed previous thereto, nor when or by whom, and I don't know the contents thereof. In fact, I have no knowledge whatever on the subject.

43rd. I don't know whether the vessel had at any time sailed or acted in company or concert with any armed vessels in cruising against, pursuing, or seizing as prizes any persons, vessels, or property of the citizens of the United States, and I never heard of any such thing.

LEVI BURSEY.

Sworn to before *me* this 29 day of July, 1898.

JOHN IRWIN,
Prize Commissioner.
EDWARD McCRADY,
Prize Commissioner.
JOS. W. BARNWELL,
Prize Commissioner.

78 *Testimony of Horatius Shawner in Preparatorio.*

UNITED STATES OF AMERICA,
District of South Carolina.

THE UNITED STATES
vs.
THE NEWFOUNDLAND.

Deposition of Horatius Shawner, a witness produced, sworn, and examined *in preparatorio* on the 30th day of July, 1898, at Charleston, S. C., on the standing interrogatories established by the district court of the United States for the district of South Carolina, said witness having been produced for the purpose of such examination by the United States in behalf of the captors of a certain ship or vessel called the Newfoundland and her cargo.

To the 1st interrogatory deponent says: Newfoundland, the lower end of Newfoundland; that is my home now, and I have lived there all my days. I owe allegiance to Great Britain. I am not a citizen of the United States. I am not a married man.

2nd. I was to the wheel.

3rd. I can't recollect; it was July, 1898; it was off Havana, I think; we were brought into the port of Charleston, S. C. I know nothing of any commission nor from whom it was. I don't know anything about it in any way.

4th. The English colors. She had no other colors that I know of.

5th. No resistance was made. One gun was fired by the Mayflower. We were told it was the Mayflower. There were
79 no other ships in sight. Our vessel was a merchantman. I don't know to whom she belonged. I don't know what the capturing vessel was. The crew told us she was a torpedo-boat destroyer of the United States.

6th. I don't know if the capturing vessel had any commission to act in the seizure or capture of our vessel, nor from whom. The capture was made by the Mayflower, so far as I could learn. I don't know whether our ship was condemned or not.

7th. The Newfoundland. Captain Malcolm is the master. I don't know his first name nor who appointed him to the command of the vessel nor where he was appointed. I have heard talk of this vessel for 3 years. I came to Halifax in April from Newfoundland, and I joined this vessel on the 4th July, 1898. I never saw the captain

until he went as captain of the Newfoundland. The first time I saw the captain was when I signed, the 4th July, at Halifax. I don't know when he took possession or who delivered the ship to him. I don't know where the captain lives or anything about him nor what country he is a citizen of.

8th. I don't know the tonnage of the ship. We had on board 6 sailors, 6 firemen, 3 engineers, the captain, first and second mate-, steward and cook, and coal-heaver and saloon boy. All were aboard at the time of the capture. I don't know where all belonged to. Quite a lot were Newfoundlanders—not all, though. The sailors all came aboard at Halifax the same time. I know nothing about the rest of the people. They were different from us. The sailors came aboard the 4th July. I forget the shipping master's name. We signed in the saloon of the ship, at Halifax, on the 4th July.

80 9th. Yes; as sailor before the mast I had no interest in the vessel or the goods ladened on her, and, so far as I know, none of the crew had any.

10th. I have heard talk of the ship for 3 years. I never saw the ship until some time in April, at Halifax, 1898. She did not carry any guns, as far as I know. I have already stated how many men were aboard. I don't know the exact number. There was no engagement at the time of capture. I don't know where the ship was built. She was called the Newfoundland. I don't know whether she was ever called by any other name.

11th. The West Indies; some West Indian port. I don't know the port. The voyage began at Halifax. I don't know where it was to have ended. I just signed to go the trip on the ship. I signed on the ship at Halifax, to get paid when I got back again. I don't know what sort of cargo she carried. I don't know anything about the cargo at all. The cargo was put on board in Halifax. I think it commenced to be put in the latter part of June and the first of July. I don't know anything about the cargo, whether contraband of war or what kind of goods.

12th. I don't know anything about the ship's papers. She was in no port; never sailed to any port. This voyage began at Halifax, and I don't know where it was to end. She had delivered no cargo up to the time of the capture. I don't know anything about the cargo. She sailed from Halifax; that is the only port.

13th. I don't know what lading she had on board at the time of her first setting forth and when taken. Some of the cargo, I think, was put on in June and the rest in July. I don't know what

81 her cargo was or the different species.

14th. I don't know who were the owners of the vessel and goods at the time of the capture, nor do I know what nation or country they are by birth, nor how long they have resided there or where they previously resided, nor what country they are citizens of.

15th. I don't know anything about the bills of sale, where given, or in whose presence it was made, if any. I don't know whether any engagements were entered into concerning the purchase further

than appears on the bill of sale. I never saw it and I don't know what has become of it *it*.

16th. Some, I think, in the letter part of June and some in July. I don't know the names of the owners, laders, or consignees nor anything about them. I don't know where the goods were to be delivered or for whose real account or benefit. I don't kno- anything about the interest of the owner of the goods. I don't know the quantity or quality or appearance of said goods. I don't know anything about the delivery of said goods, whether, if restored to the destined ports, they would belong to the same persons and none other.

17th. I don't know how many bills of lading were signed nor whether any were false or colorable or whether any were signed different in any respect from those on board the vessel at the time she was taken, and I don't know the contents of such bills of lading, if any, or what has become of them.

82 18th. I have not in my possession and don't know whether there were on board any bills of lading, invoices, letters, or other writings to show my own interest or the interest of anybody else in the vessel or cargo, and I know nothing of any papers referred to in this question.

19th. The vessel's course was west; that is all I know. I was at the wheel at the time. I can't remember the day; it was in 1898, in July; I think off Havana. I don't know how far from shore. I don't know whether it was near any port of the United States; so far as I know, it was not. I don't know whether any charter-party was signed for this voyage, nor by whom, nor when; none such is in my possession, and I don't know its contents.

20th. I don't know what bills of lading, letters, or other writings were on board at the time she took her departure from her last clearing port, and I don't know whether any were burnt, thrown overboard, or destroyed.

21st. I know that Spain was at war with the United States. I did not know that Havana was blockaded. I knew nothing about Havana. I heard about the war before I left Halifax. If the master knew it, he never told me.

22nd. We never attempted to enter Havana. I don't know whether Havana was under a state of blockade before we were captured by the Mayflower. Yes; we had notice of such blockade by two or three tugs that boarded us, but we never entered or attempted to enter any port or to sail from any port, and, so far as I know, no endorsement was made on the register of the ship.

23rd. I can't say whether the register was shown to or examined by any officer of the U. S. Navy or revenue officer of the U. S. before the capture. She never entered any port. I don't know any-

83 thing about the endorsements by the U. S. officers.

24th. I was never in the ship before this voyage. I heard that she ran the blockade before. I don't know where she ran the blockade; all I heard she ran the blockade before. I heard that from the crew. I don't know which member of the crew. I only just heard it. I don't know what port she ran the blockade; they

didn't tell me the facts. I didn't make any inquiry. The ship was blamed for running the blockade before, and I heard it.

25th. She has never been condemned as a prize, so far as I know.

26th. No; I have not sustained any loss by the capture of the vessel, and I have not received any indemnity, satisfaction, or promise of satisfaction for any loss I have or may sustain from this capture by any one.

27th. I don't know whether the vessel or goods are insured.

28th. I don't know whether on the arrival at the destined port the cargo or any part would immediately have become the property of the consignee or whether the lader was to take the chance of the market for the sale of the goods.

29th. I don't know any particulars about the cargo.

30th. The cargo was taken from the wharf—I don't know the name—in the month of June and July, 1898.

31st. I don't know whether there are in any country besides the United States or on board of any other vessel any bills of lading, invoices, letters, instruments, papers, or documents relative
84 to the said vessel and cargo, and I don't know the contents of such papers.

32nd. As far as I know, no papers were delivered out of the vessel. I don't know anything about the papers whatsoever.

33rd. The cargo was not broken, as far as I know, not in my presence, either before or after the capture.

34th. No passengers were on the vessel and nonw were hidden away. There were no officers, soldiers, or mariners secreted that I know of, and no citizen of the United States secreted or confined at the time of the capture. There were not on board any citizen of the United States of any Territory or State then in war or rebellion against the United States, its government or laws.

35th. I don't know anything about passports, sea briefs, charter-parties, bills of sale, invoices, nor papers found on board of the vessel; in fact, I don't know anything about the papers in any way, nor do I know when or from whom or where they were obtained, nor for how long a time they were to last, nor whether any duty or fee was payable for the same, nor whether any duty or fee was to be paid for the renewal, nor whether the vessel was in the country where the passports and sea briefs were granted, if any were granted, and I don't knew whether any person on board had a passport or license of safe conduct. I don't know anything about the bills of lading or papers or in whose possession they are, or whether they differ from the papers on board the vessel, or anything about the papers. I have not written or signed any papers concerning the vessel or cargo.

85 36th. Her course was west. She was bound for some port of the West Indies. I don't know what port in particular. I know nothing of what port she was sailing for when taken. Her course was not altered upon the appearance of the vessel by which she was taken. I don't know to what port she was heading for at any time. I don't know about it, and I am not supposed to know. I don't know what distance she was from the port of destination according

to the papers. Her course was not altered while I was at the wheel. Her course had been altered since she left Halifax, I suppose. I don't know when it was altered. When the American officers came aboard the course would be altered every day. As far as I understood, it was off Havana when we were captured. I don't know what port we were off when the first American officer came aboard, or the second or the third. When they captured us I understood it was off Havana. I took the wheel at 8 o'clock at night the day of the capture, and the course was not altered while I was at the wheel.

37th. I don't know by whom or to whom the vessel has been sold or transferred or how often, nor at what time or place, nor for what consideration, nor whether the consideration has been paid or satisfied, nor whether the sum was a fair and true equivalent, nor by whom paid. I have no knowledge or information whether any sale or transfer has been truly made nor whether it was for the purpose of covering or concealing the real property. I don't know if the vessel were restored whether she would belong to the persons said to be the owners and none other.

38th. No guns were mounted on the vessel, and no arms
86 or ammunition belonging to the ship. I saw nothing of any guns, weapons, warlike arms, or armament of any description, nor parts of arms not put together or finished, or any ammunition, fixed or unfixed, or balls, shells, rockets, hand grenades, flints, percussion caps, or anything intended for military equipment. As far as I know, there were no belts, ball moulds, saltpetre, nitre, camp equipage, military tools, uniforms, soldiers' clothing or accoutrements, or any sort of warlike or naval stores; nor were any of these things thrown overboard to prevent suspicion at the time of capture or concealed under the name of merchandise or any other colorable appellation in the ship's papers. I know of no such material destined for any fort. I never heard of any law, ordinance, or placard existing in such country prohibiting the exportation of the same by any private party without a license. There were no warlike or naval stores on board.

39th. We believed she was going to Kingston, Jamaica. I think that was the port.

40th. She was not on this voyage, and, as far as I know, she was not on former voyages, under the convoy of a ship of war or armed vessel. I had no instructions to avoid capture from anybody and none for destroying, concealing, or refusing to give up the vessel's papers or any papers that might have been on board. I have no such instructions in my possession.

41st. This is my first voyage on the ship. It was reported that she ran the blockade before. That is all I know. I was not in the ship. It was common report; not on board the ship, but in Halifax. I was not in her. All I know is just what I heard. I
87 don't know when I heard the port was blockaded from which the ship tried to run the blockade. I can't say what vessel, but I know she was warned on this voyage not to enter any Spanish ports, as far — I understood. I recollect no conversation thereon.

I don't know what course our ship pursued after she was warned off.

42nd. I know nothing about that. So far as I know, she had no commission to cruise against the persons or property of the citizens of the United States.

43rd. I don't know that the vessel at any time sailed or acted in concert with any armed vessel or vessels in cru-sing against, pursuing, or seizing as prizes any persons, vessels, or property of the citizens of the United States.

HORATIO SHAWNER.

Sworn to before us this 30 day of July, 1898.

JOHN IRWIN,
Prize Commissioner.
EDWARD McCRADY,
Prize Commissioner.
JOS. W. BARNWELL,
Prize Commissioner.

88 THE UNITED STATES OF AMERICA, *District of South Carolina.*

THE UNITED STATES
vs.
THE STEAMER "NEWFOUNDLAND."

The following correction and addition was made by witness Horatius Shawner upon reading over his testimony in the presence of the commissioners:

22. I don't know whether we were warned, whether Havana was blockaded or not.

HORATIO SHAWNER.

Sworn to and subscribed before us this 30th day of August, 1898.

JOHN IRWIN,
Prize Commissioner.
EDWARD McCRADY,
Prize Commissioner.
JOS. W. BARNWELL,
Prize Commissioner.

89 *Testimony of Captain M. R. S. Mackenzie on Final Hearing.*

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the District Court.

THE UNITED STATES
vs.
THE NEWFOUNDLAND.

CHARLESTON, S. C., *August* 30, 1898.

Captain M. R. S. MACKENZIE sworn.

By the U. S. ATTORNEY:

Q. What position do you occupy?

A. I am a commander in the navy; commander of the U. S. S. Mayflower.

Q. Where have you been on duty?

A. Most of the time recently on the blockade duty off Havana.

Q. Where were you in the month of July?

A. Most of the month off Havana.

Q. Did you meet the steamer Newfoundland while on that duty?

A. We found her one night.

Q. What time was that—what night?

A. It was the 19th of July.

Q. State the circumstances attending that meeting just in your own language.

A. We were on the blockade off Havana on the night of the 19th of July. I was senior officer. The blockade was pretty light. We were covering about five points of the compass on the bearing from Morro. We would steam off, having the Morro bearing
90 south-southwest, and go on until it bore southeast by south, and then back again. When we were about north by east of the Morro light, about 8.30 p. m., a faint light was reported about north by west of us. It was, I thought, a plain lantern, no lens, and the light was not shown steadily. It looked more like a light not meant to be seen, and it bore from us about north by west, about two miles off; not more than three miles. We immediately stood for the light and rung up full steam and sent down for the boilers to be at forced draught, and we got the ship going as fast as we could, and before we got there we were going at the rate of sixteen knots. We would lose this light and then we would see it, and then we would lose it entirely. We stood on about north-northwest, and finally saw it again on the port beam, and we stood for it again, and then saw it on the starboard beam, and we stood for it and lost it, and I don't think the night was dark. We saw the ship until within half a mile of it. In all this time we couldn't see anything but a faint light—no running lights—which probably after

we began the chase we ought not to see, as we were abaft the beam, but we should have seen it before we sighted the faint light, if coming from the eastward. We came up to her close to ten o'clock and fired a blank charge, and she brought to promptly. She blew the whistle as if some one had his hand on the whistle-pull and expected us, and we sent the boarding officer right over.

It is pretty hard to distinguish between what I know myself and what was reported to me, so if I mix up what is reported and what I know, stop me.

91 Q. Who was the boarding officer?

A. Lieutenant Culver, who came back in a few minutes with the master, Captain Malcolm, and the ship's papers. He told me at the time that the crew were all on the deck dressed; that the captain had his papers all ready, and that he had told him that he had not made up his mind where he was going. That statement the captain contradicted, saying he had not understood what Mr. Culver had said. I then looked over Captain Malcolm's papers and found that he had been warned of the blockade off the north coast of Cuba several times, but chiefly he had been warned by the Tecumseh, of the Havana blockade, according to Captain Malcolm, at six o'clock of the same evening. Captain Malcolm told me he had been steaming at the rate of 8 knots and, as I remember, west by north. I knew pretty well where the Tecumseh ought to have been, and I could not account in my own mind for all the time between the boarding by the Tecumseh and the boarding by us. The Newfoundland ought to have made a longer run, unless she had been loitering outside the blockade for a signal from shore for a chance to run in.

I looked over his papers. The thing that struck me as most important was that he had two clearances—one for Kingston and one for Vera Cruz. I know it is not the practice of any American custom-house to give two clearances. If the ship wants to go to two ports, they give one clearance. From Halifax to Kingston or Halifax to Vera Cruz, via Kingston, they give only one clearance, not for alternative ports, as in this case. That was suspicious.

92 Then her cargo was suspicious, and we had been informed by the navy department at Halifax and reports by hearsay that she had come from Newfoundland and was going to run the blockade. We knew her general business was that of a sealer. She was not properly in the West Indian trade, and we believed, and I hadn't the slightest doubt until Captain Malcolm told me it was not so, that she was running without lights. She has got an hour and a half to account for between the Tecumseh's boarding her and our boarding her. I thought Captain Malcolm seemed to be perfectly straightforward, but rather contradictory, and I hadn't any doubt in my own mind that he was going to run into Havana that night, but if he gets off I will be very glad.

Q. Do you remember where he said he was making for?

A. Vera Cruz. If he was going there, he would have to go through Florida, and if for Kingston the Crooked Island channel was all right. He gave me a plausible explanation. As I understood him,

he wanted to go to Kingston and Vera Cruz. He was to go down through the Crooked Island passage. When he got through there, if he had coal enough to go to Vera Cruz and then reach Kingston, he was to go to Vera Cruz; if not enough coal, to go to Kingston in order to take on coal. It is plausible, but an expensive trip in the way of coal.

Q. The statement that he was going to Vera Cruz was positive on his part?

A. I don't think any of his statements were very positive. He told me when he came on board he was going to Vera Cruz; to the boarding officer he didn't say that.

93 Q. Did you make or cause any chart to be made of the position of your vessel and the position of the Newfoundland?

A. The navigating officer, Mr. Culver, made a tracing the next morning from our first position when we sighted the Newfoundland and the last position.

Q. That was made under your direction?

A. He made it from the log—from the run of the ship. He is the person charged with that work on the ship. Of course, when changing courses pretty frequently and running at various speeds, you understand, things can't be down to one-sixteenth of a mile. The thing is very close, but the first position and the final position are quite accurate.

Q. The first and final positions, they are correct?

A. Yes; very nearly, judging from the position of the light, and the Morro was lighted that night. The principal point that governed me was from half past five, when boarded by the Tecumseh; they had it at six o'clock. Probably it was a difference of the times of the two vessels. From half past five till we saw her, at half past eight, she ought to have run 24 miles. Now, the Tecumseh gives her position in the official report as 3 miles. On that tracing you will see a large circle, which covers where the Tecumseh boarded her. If you take the farthest position on that circle to her position at 8.30, the greatest distance is about 12 miles; that is run in three hours.

Q. This difference in time—half hour between your time and her time?

94 A. Between the Tecumseh's time and her time. Her position at 8.30 by the log and our position agreed almost exactly. She gives it north of Morro, and we give it about north half west, a very slight difference; but there is twelve miles gone; that is an hour and a half.

Q. According to this, she made in three hours but 12 miles?

A. Couldn't have made more if she was at the farthest point, by the Tecumseh's report; if at the nearest point, only five or six miles.

Q. Were you near enough, or was she near enough, to have seen any signals from the shore, Morro?

A. Yes; all the Morro lights and the search-lights. They had some signal lights we were never clever enough to make anything of. The Morro lights could be seen where we boarded her.

Q. A vessel lying off there and intending to run the blockade—do you know anything about the condition of Havana? What is the extent and condition of the harbor, whether it is safe to run in without being signalled?

A. I presume, I don't know, that all the mines at Havana were all observation mines, and in that case they wouldn't touch them off if a friend were coming in. A vessel engaged in blockade-running has to have some signals when they are going in. A vessel off shore couldn't make the signals, because then the blockading vessel could see it. Very frequently there were signals from shore, and our people thought some of the signals meant a blockade-runner was going to come in. I never thought much of their mak-
95 ing anything out of it. The Newfoundland was out of her way, bound either to Vera Cruz or Kingston, and she has got an hour and a half between 5.30 and 8.30 to account for, in which, I believe, she was loitering outside of the blockade, and I am confident her lights were not burning—the ordinary running lights required by law—before we sighted her, when she was to the eastward of us; we must have seen the masthead light.

Q. From where she was warned by the Tecumseh, if she had made anything like a direct course, would she have passed in such a direction that you must have seen her running lights?

A. We must have seen the light before we started in chase. After we started in chase we would have been abaft the lights. During the chase there would be one or two doubtful times. If you knew the relative position of the ships, you could tell, but it was at night and in coming towards her we must have seen the masthead light; those lights must show five miles, and they often show a good deal more.

Q. When you finally saw the Newfoundland's light-, did they appear to be the average quality of lights?

A. Yes; I should say good lights, oil lights—not as good as electric—and they must have been lit some little time before we saw them. The instant we ran into the proper position to see them, we saw the proper lights; they seemed to be lit up pretty well forward, as if some door might have been opened. The main thing—a very unusual thing for a ship running in ordinary time not to show stray lights, lights through the air ports through the cabin, and all
96 that sort of business; they have several lights—at least 10 or 11. You don't see a dark ship unless she is evidently shut down.

Q. This light that you saw from time to time, did it have the same appearance?

A. We saw it and then we wouldn't see it. It looked like a light without any lens in front; a plain glass lantern or ordinary lantern; sometimes obscured and sometimes not.

Q. When you got up to her near enough to see the vessel you could see this light then?

A. I don't remember about that. The officer who boarded her could tell you more about that.

Q. From her position when she was first warned off Sagua la

Grande, if she had been then making for Kingston, would that carry her by the place you sighted her?

A. It was about 240 miles nearer to Kingston to go by Cape Maysi, and the current is better; 240 miles further to go by San Antonio. I brought up a chart that would show you that better.

Q. Captain Malcolm in his testimony stated that he was going from Halifax to Kingston, as that was the point he had in view when he left Halifax, was to go to Kingston.

A. He was a long way out of the way for Kingston.

Q. Would he have gone through the Crooked Island passage at all if he had gone the nearest and best way?

A. There is a difference between the nearest and the best way. Probably Mariguana was the shortest, but it was not well lighted. Most vessels would take the Crooked Island passage, as it was the best lighted. It is a perfectly correct passage to Kingston, and perfectly correct passage if he had the alternative to Kings-
97 ton or Vera Cruz. If he is going to Sagua and then from Sagua la Grande, Caibarien, he loses 240 miles going around the west end. (Captain Mackensie indicates on the map the positions and passage above referred to.) Another thing that struck me, the captain told me this was his first voyage in the ship, and she is an old sealer, her ordinary line of business, and not a vessel accustomed to cruise in the West Indies, unless there was something to make such cruising profitable, something unusual.

Q. Did he say anything to you about trying to land at Sagua la Grande or Caibarien?

A. Nothing.

Q. Did he say anything about when he first learned about the blockade of the northern coast?

A. He told me he had been boarded by several vessels, and there is an entry in his log that the coast was pretty full of cruisers and gunboats. The blockade of Sagua la Grande and Caibarien was, I think, established in June. I have no official copy of the proclamation. I saw it in the newspapers, and knew it when our ships went down to establish it.

Q. Having come through the Crooked Island passage, if her destination was Kingston, wouldn't her proper course have been around the eastern end?

A. I should say it was 700 or 800 miles out of the way to go by the west end to go to Kingston (indicating on the map).

Q. So it would have been several hundred miles out of the way?

A. At least 600 miles. I can tell you in a moment exactly.
98 This is a pretty good guide from Havana to Kingston; it is about an even thing or distance, the course from Sagua la Grande around the eastern end. Sagua la Grande is a suspicious port, because the Spanish government made special arrangements with the railroads to get provisions in for their troops.

By Mr. BARKER:

Q. Do you know that of your own knowledge?

A. No; I don't absolutely know it of my own knowledge. I

never landed there. This has been reported to me semi-officially by the captain of another ship. That is the trouble to distinguish between what I know and what I have had reported.

By the U. S. ATTORNEY:

Q. The captain of the Newfoundland testified that he was bound to his destination — was Kingston. "She was steering her course towards Kingston; the course was not altered after we saw the ship until we stopped our engines. It was always directed to the course destined by the ship's papers. The course I steered followed out my instructions from Robertson & Company. The courses were in accordance with his instructions as far as my judgment goes." Will you state from examination of the chart how far he was out of his course when captured? The captain testified the course was not altered towards any other port, but the course was frequently altered; that he couldn't tell how often. I will ask this question: The testimony of the captain of the Newfoundland was that her destination was Kingston, and that she was bound for Kingston when captured; will you inspect the chart and say how far the Newfoundland had gone out of her way to Kingston?

A. Do you mean from Halifax to Kingston or Sagua to Kingston?

Q. From Halifax and Sagua both.

A. From the southern end of the Crooked Island passage, going by Cape Maysi, 340 miles to Kingston; going by the old Ba-
99 hamas and up to Cape Maysi, some 1,200 miles.

Cross-examination by Mr. BARKER:

I call your honor's attention and Captain Mackensie's to the standing interrogatory to which that reply insisted upon is directed. (Reads interrogatory No. 36 to the court.)

Q. Have you stated all of the grounds upon which you determined to send this vessel in?

A. As well as I can remember. I don't know whether I stated that we were all warned to expect her.

Q. How were you warned?

A. By official telegrams from the Navy Department.

Q. Have you any of them with you?

A. They would go to the senior officer at Key West, and he would send us typewritten copies.

Q. We will have to rely on your memory. What was the purport of this warning?

A. My memory would be very good. The purport was the Newfoundland meant to run the blockade. I rather think that the district attorney has copies of those telegrams.

Q. Was the telegram from Washington any more than that she was going to Cuba?

A. If you want the exact wording you will have to get the telegrams. I think Mr. Lathrop has them. The information from the consul general was—it is only founded on hearsay of harbors like

Halifax, which do a large business, and I don't know how re-
100 liable—the information was these two ships were to run the blockade. Just as the other day I was at St. Thomas and the information was general in the islands that the Regulus and the Newfoundland had a guarantee from the Spanish government.

Q. And yet she has been released?

A. I don't know what they do at Key West; you see, we did not send our prize into Key West; they have released a great many ships at Key West.

Q. The Government has released her, although she had a cargo at Sagua and landed?

A. Yes; and was caught coming out.

Q. And in spite of that the Government has recognized the propriety of releasing her?

A. I can tell you, furthermore, that she meant to be caught; she was insured for capture—that is, from the captain of the vessel who caught her.

Q. I want to know whether we are not fairly entitled to assume, when you got this warning that this ship had left Nova Scotia, whether there was not, from the position that you gentlemen of the navy had occupied for months, on the lookout for vessels, whether there was not an immediate interpretation put on your minds that she was aiming for Cuba; that she was going to run the blockade.

A. No; because all the politicians and diplomatists in both countries, I don't think, are going to make trouble with the English sea-fearing people and America. I told the captain I would be glad if he could get off, and that I didn't blame him, only
101 Englishmen and Americans make successful blockade-runners; we try to catch them and they try to run in, and it is only a question which is the smartest. I would not have sent the ship in if she had not been spoken by the Tecumseh and then not showing running lights.

Q. You dwelt in your testimony upon the fact that she could not account for three hours and a half.

A. For 12 miles out of 24.

Q. What speed did you attribute to her?

A. 8 knots. I got that from the captain. He said the coal was getting short. He was making 8 knots.

Q. Could you not account for something less than 8 knots for the current?

A. The current is very variable off Havana and we had not had any easterly winds for three weeks.

Q. Didn't you tell the captain there was an east current?

A. In the main the current varies very much; it will be in shore and then off shore. I have been there when we drifted as much as 24 miles a day; ten miles off Havana.

Q. Wouldn't it have been, assuming the extreme point she was making 8 knots an hour, that may have been her capacity or her ordinary run?

A. She was making pretty good speed, for when we pulled her up she had to blow off steam pretty hard.

Q. If running seven knots she would have to blow off very hard?

A. No; with 7 knots they are carrying the fires lighted.

102 Q. In making the calculation, you have assumed she was met by the Tecumseh at 5.35?

A. From the Tecumseh's time, I got that the next morning.

Q. You didn't have that then?

A. No.

Q. When you arrested her that calculation of time had not been made?

A. Approximately, relatively, I can't tell to the mile; I know the Tecumseh's position on the blockade, and according to the captain she was boarded at 6 o'clock.

Q. How did you know the Tecumseh had boarded her?

A. It was entered on the log or register.

Q. You took the log for that as proof. Did you accept the other statements on the log?

A. This statement on the log was by the boarding officer of the Tecumseh. This statement is by one of our own officers, who, when he boards, makes this entry on the log or register of the vessel. That is the practice of nations, and it is impossible for me to account for all the time between——

Q. Assuming she was making 8 knots an hour, it is not possible for you to account for it, taking her start at 5.35?

A. Taking her time at 6, she had two hours and a half—that is, 20 miles.

Q. How far was the Tecumseh from the place she was captured (the Newfoundland)?

A. From where we sighted her, not more than 9 or 10 miles.

Q. It looks like more than 10 miles here?

103 A. I don't quite understand.

Q. From where the Tecumseh lay.

A. Not where the Tecumseh lay; where she boarded her (indicating on the map). The Tecumseh's report is, they boarded her at a certain latitude and longitude, and she gives three miles' limit of their correctness, and where we sighted her is measured from that farthest point, the farthest you can get on that circle, and then that is about 12 miles, and the nearest position is, of course, much less—a little over 4 miles, the nearest position—and so I think she was loitering there. It may or it may not be so; that is what it looks like to me.

Q. What assurance have you that that was the position she was in when you saw her?

A. I have my own position, and we sighted her, and we have to judge the position from the light, and if you consult her log 8.30 will agree substantially with where we sighted her. She puts herself 10 miles north of the Morro, and that agrees almost exactly.

Q. I understand that you recognize that there is a difference between the time of the Tecumseh and that which was kept on board of the ship?

A. She logs at 6 o'clock and the Tecumseh at 5.35, and I estimate that as a difference in the time. Her time agrees, I think, pretty

well with our time. I am not sure; I don't know what time they allowed for boarding her; I think we made it 10 o'clock. I would like to say about the entry in the log. I only made that because the captain asked me to do so. I suppose to clear himself
104 with his owners.

Q. Suppose she was not going 8 or 7 knots?

A. There would be still time to account for.

Q. She being at a point east of north from Havana light would be about how many miles from a due north point; how much would that point represent?

A. It depends on how much she was off; how far off she was from the light; how much distance she would have to cover one point; it is a circumference of a circle; one point is $\frac{1}{8}$th of a right angle.

Q. At 17½ miles off there would be an opening of very different extent than what there would be at 10?

A. Exactly what 17½ is to 10.

Q. Suppose that was 3½ miles?

A. I would rather work it out.

Q. We have worked it out on the chart, and thus you find her seventeen miles according to your estimate—seventeen miles from Havana light to the west of north and south lines?

A. I think she was north-northwest, westerly. I would have to refresh my memory. "About 17 miles north-northwest of Morro."

Q. Taking our calculation, which is about 21 miles, there is a difference between the captain and yourself as to the distance of Morro light.

A. The light was well in sight; it is an 18-mile light.

Q. It is 21 miles light when it dips?

A. It depends on the eye.

105 Q. At 15 feet elevation from the sea; it is laid down on the chart; you can see it 21 miles when it dips, and that was the foundation of the captain's calculation that he was 21 miles off. Your memorandum, put on the log, makes it 17 miles. Taking it as 21 miles and the bearings as stated, north-northwest half west, we calculate on the chart 10½ miles further; we begin with 3½ where she was at 8 o'clock, and then 3½ miles from the light, due north from Havana to the east, and travelling 3½ she goes a little further west 10½ and reaches the point you overhauled her; that gives her 14 miles from 8 o'clock to 10, and at a speed of 7 miles an hour she would exactly accomplish that distance, going in an absolutely straight line.

A. From 8.30 to 10.30?

Q. No; really from 8 o'clock; that distance I gave you—the memorandum of the captain on the log. He took his position at 8 o'clock and then ran two hours in a due west course to the point where he was captured.

A. I think he logs his position 8.30.

Q. The log. I am speaking of the captain's taking his position.

A. His position is put down in Captain Malcolm's log?

Q. No; because the mate's calculations are put on the log, and

the captain's are put on the chart, and he took his position at 8 o'clock and found himself one point east of north of Havana light, and from that point to the point where you stopped him is, according to our calculation, 14 miles, in those two hours, running a straight due west course at the rate he gives of about 7 miles an hour.

106 A. Running due west.

Q. About 7 miles an hour, unless he ran 8 miles an hour, there was not any possibility of this divergence from that course due west, as all the testimony is from the crew of the Newfoundland. They were under the impression they were running a straight course west. They were all examined separately, and they all concurred in saying she ran a westerly course. Captain Malcolm stated in his testimony after he left the Tecumseh a little after six that the captain of the Tecumseh told him not to go any nearer the shore, and, acting under that, he bore off one point north by west and followed that for two hours until 8 o'clock, when he felt that he was far enough off and took again his westward course. In the meantime the others on board the ship testified that her course was west. They did not notice the single point of divergence at 8 o'clock; that is the situation as we understand it.

In recurring to the points of suspicion that affected your mind you mentioned that this vessel was ordinarily a sealer as you understood, and that there was no reason for her being in those waters in the West Indian trade unless there was some special incentive. Was that a wrong in your idea, to carry a cargo from a neutral point to an unblockaded point in Cuba?

A. I don't think it wrong to try and run the blockade.

Q Going with instructions not to enter a blockade port, was there anything wrong or suspicious inherently for a man having a cargo from a neutral point to go to a port in Cuba?

A. I don't think there is anything wrong in running the

107 blockade if he can do it.

Q. It was noted as an argument of suspicion that he was a sealer and out of his course as a sealer, and that he was in the sacred waters of the United States surrounding the island of Cuba; I don't know how many miles, but there he was; he, being a sealer, was not where he ought to have been, and it must be for some ulterior reason?

A. I think that it was. I think he was there for that, if you ask me. I don't understand that I am on trial here.

Q. Yes; you are to a certain extent; it is upon your suspicions and statement that this question of whether the ship and cargo shall be condemned or not.

A. When it comes to the owner suing me, I should be on trial.

Q. We have the right to sift the foundation of your mental condition at the time you entertained the suspicions when you arrested this vessel.

A. I wish you could have been in my office that night, with all the ports opened, and screens.

Q. I call your attention to the fact that things can look very sus-

picion when looked at through suspecting glasses, and you gentlemen of the navy down there had been living down there in the palace of suspicion; you had been looking for blockade-runners?

A. Yes.

Q. And took intimations of any vessel coming towards the coast of Cuba, and when you saw this light off about two miles beyond your position you made your course for it?

A. Yes.

Q. You couldn't see that vessel at that time?

A. No.

Q. There was nothing to indicate the vessel being there,
108 except the accidental light?

A. No.

Q. You have assumed in your testimony that she had concealed her lights prior to that time because your people had not seen the lights. I want to ask you whether that is a reasonable conclusion for the court to arrive at or you to arrive at in your judgment of this intention of these parties. Because you didn't see the light, is it to be fully and conclusively assumed that those lights were concealed?

A. I think absolutely reasonable. I think we had the best lookout on the bridge of the Mayflower I know of. I had two men, both trained, come into the service since the war, one the mate of a vessel and the other the master of a New York tug. They came in for the service of the war, and they didn't do anything but keep a glass to their eye, and we saw everything to be seen. It is very strong proof when you see a faint light at a couple of miles off; not a brighter light to be seen. You know how the masthead light on a steamer will show over 5 or 6 miles off. It is good, and covered with a lens, and cannot be mistaken; and before, when the Newfoundland was to the eastward of us, we must see that masthead light, if lit. I had not the least idea they were lighted until the captain told me they were lighted. After we were chasing them they were all lighted.

Q. You have introduced an idea into this case—innocently pasted on that log your verdict about that vessel. I don't think you measured at all the extent of the harm you were doing.

A. The captain of the steamer asked me to put something on his log—something for his owners—and that is what I gave him.

Q. When he asked for bread you gave him that?

109 A. That never occurred to me.

Q. Does it occur to you now when you read that memorandum that it is your condemnation of this vessel for attempting to go to the port of Havana?

A. No; I am not to give the captain all of my reasons.

Q. You wanted to give him something to help him with his owners?

A. I wanted to put down where I seized him.

Q. You put down there your full suspicions and the extent of them for seizing him?

A. No; I don't think I mentioned his lights or about his loitering?

Q. I think you inadvertently fixed him in this memora*d*num as much as if you had seen the Tecumseh and had had time to sit down and consult with them. (Reads memorandum from log.) You thought that would help the master with his owners?

A. Is there anything there about the lights not showing or anything about his running the blockade? Then I didn't say the regulation lights were not lit.

Q. You only said occasionally visible?

A. No; I said a little faint light, afterwards only occasionally visible; that had no reference to her running lights, nor were there any words about her loitering. I made up my mind that as soon as I saw the Tecumseh had boarded her that I would see the Tecumseh the next morning.

Q. Did you in your estimate of her suspicious conduct take it that she was on the west course, and when you detected her she was farthest from Havana, when you saw the faint light?

A. I don't know how much she took us for.

Q. You didn't carry lights?

110 A. No; not when we could help it. We don't intend for them to see us.

Q. I want you to be very indulgent to me on the question of nautical terms and nautical knowledge I may have on these matters. I want to get from you really the statement of what your view of this matter will be, and I tell you frankly I want to get you to admit — the apparent changing of her course to you may have been an effect consistent with her going on an absolutely straight westerly course while you first followed on one side and then on the other.

A. I admit *I* that *that* maybe she didn't change her course; it is possible but not probable that we would overrun her course.

Q. You were overrunning the light on the port side?

A. We never saw her port light.

Q. Suppose the companionway of a ship with an opening on the port and starboard side and a lantern hanging in the companionway, the light of which would be visible at certain points through each of those openings, she going now on a w-sterly course and having passed a point two points abaft the beam, where you would lose the sight of the light if you saw it before, it would be possible for her in her position relative to your position to open to your vessel the lantern showing through the port opening of the companionway?

A. Oh, yes; I have not seen the companionway. You probably can get positive information from the boarding officer.

Q. I am giving you a hypothetical case. Assuming there is a companionway and a lantern hanging in it and there is on the port side an opening, through which that light would be visible at a certain angle, and another on the starboard side, through which

111 it would also be visible, and the vessel going west and you following the light, the light from the companionway, you would bear towards that light as it retired, and in doing that

wouldn't it be possible for you to overrun that course and open the light through the starboard side?

A. Yes.

Q. In that way, assuming you got in that position, you would change your course and bear down a little beyond where you saw that light; she going still west, it was possible for you to overrun that again and open the light on the port side; then you would again bear down on the direction you had last seen the port light, to overtake it?

A. Yes; that diagram will show; that is quite possible, but you can't reconcile it with steering a west course.

Q. I ask you if that, assuming that she took a west course——

A. Not with a west course, we pursuing her; as we pursued her it might happen we would see the light first on one beam and then on another. It couldn't happen, she being ten miles north of Morro and steering west and coming to 17½ miles on the bearings she has given there.

Q. Leaving the Morro out, taking the vessel in mid-ocean pursuing a straight course—a vessel, seeing a light on her, found her due north and steering as soon as she saw her northwesterly course, that vessel going on concealing that light by going on the moment it came two points abaft the beam, would you lose that light if the light was on the port side in the companionway? Wouldn't it be possible to disclose that light on the starboard side?

A. Yes; I have said that several times. If you will look at the diagram you will see that it would be possible.

112 Q. I am going to get Captain Mackensie to testify that this losing and gaining of these lights was possible to happen with a vessel going a straight course in front of one pursuing.

A. Yes; and I drew the thing out the next day when I had leisure, and I came to the conclusion that it was possible for her to be steering a straight course.

Q. So, instead of her doubling and turning, it was your vessel that was doubling and turning?

A. Yes; I don't say it was, but it may have been so.

Q. In spite of your kindly feelings toward the captain and the concurrent testimony of the officers and the log report, you still say it was possible on a west course.

A. I don't say it was possible on a west course, but it was possible on a straight course.

Q. So that, not knowing at that time what the time was by the correct statement of the Tecumseh when she met her—not knowing accurately that she was going any more than 7 knots an hour, upon the basis of her merely not accounting for the time which ought to have elapsed between the leaving of the Tecumseh and the time you saw her and upon the basis of the appearance and disappearance of these lights, coupled with the notification from Halifax, you made up your judgment?

A. I really don't see what I made up my judgment on has to do with this case now. It is the evidence we can produce against the ship.

Q. It is the entire case, because you have nothing in the world—you have sent nothing but suspicions, and we have to follow up the suspicions.

A. Suppose I obtained additional evidence since, has that
113 anything to do with it?

Q. What we want to know is upon what foundation of suspicion you arrested that vessel that night?

A. Yes; I didn't know that. If that is so we can go on. I thought we were here to show what was against the ship.

Q. What particular cause why you arrested that vessel that night? I ask for your suspicions. You have recorded them there on the log.

A. I have not recorded all my suspicions.

Q. Such as they are, they have condemned this vessel in the eyes of the court and the community as a lawful prize of war. What was the foundation of your suspicions? State them so that the court may be able to judge whether you were living in a palace of absolute truth, generously guarded by all that guards a man in the palace of truth, or whether you were living in the palace of suspicion, and this conclusion you reached came from the previous suspisious condition of your mind.

A. We were boarding vessels two or three times a day, and we never sent a vessel in unless we were pretty sure of it. We were not sending in vessels on suspicion. Our navy has nothing to be ashamed of in this war.

Q. I am not questioning your sincerity, but the grounds of suspicion. I ask if you may not have had your mind so filled with the idea of this vessel sailing from Newfoundland to run the blockade that you looked upon everything she did as a suggestion of suspicion.

A. In running the blockade it is like a lot of other things. You don't always catch the person right in the act on a dark night. If he is actually running the blockade and can put up a good gait,
nothing will stop him unless he is afraid of a little gun-
114 powder. Take Havana—that is an absolutely easy place to run. Take Wilmington during the civil war, with thirty vessels at each of the entrances, and at Havana they only had 6 or 8 and no shoals, and it was an absolutely easy matter, because you have to catch the man outside. Another thing, they have very good guns—five or six guns each side—and they do good shooting. So your blockade-runner has to be caught outside. If a vessel warned at half past five and at half past eight is loitering just outside the line of blockade she ought to be sent in.

Q. Say six o'clock.

A. I prefer to take the Tecumseh's time. The Newfoundland makes it six. You have ten miles to account for from half past five to half past eight—three hours. I took her position half past eight from her log.

Q. Suppose she was over two miles?

A. She was not over; very close to two miles; possibly three miles; very close. You get into the way of judging.

Q. It was a faint light?

A. A faint light.

Q You say the light could be seen six or eight miles?

A. The masthead light. The faint light we saw hadn't any lens in front of it.

Q. The distance, you say, could possibly be either six miles or over six?

A. Seven or eight.

Q. At that distance would a lens light of the best kind seem faint the farther off it was?

A. No; the masthead lights with white lenses are so good the minute they come up above the horizon you see them every
115 way. The lights are so good only the round of the world prevents you from seeing them.

Q. You could see it as well at eight as two miles?

A. Very nearly as bright at 8 miles as 2. The masthead lights made in England—those are good lenses—you take a little light, such as you describe, in the companionway; pretty good little light if it were two miles off. As I said, that agrees very closely with the Newfoundland's log, and you take the Newfoundland's log.

A. Yes; that is my ship.

A. (Reading from log:) 8.30, Havana light bearing south 10 miles. I think you will find that pretty close agreement with ours.

Q. So far as the mate's testimony is concerned, it is conceded he made no observation; he only guessed that he was that far from shore; the ship's chart will correct that. Were there any observations taken at the time of the capture of this vessel that would fix the distance from Havana light?

A. The bearing from Morro was taken. I calculated her when we were going in as she left us that, I think, she was over 17½ miles. I think it would be pretty near right; that is a low bridge, but our bridge is higher. I think she was a little further off than 17½ miles.

Q. You don't regard the statement of the captain that it was 21 miles off?

A. I think that was a little over.

Q. There was not that wide discrepancy?

A. I think if you split the difference. I think that night we chased something else, and I think that her back run wouldn't give it to us.

Q. In what direction from you was that second chase?

116 A. I don't remember. We don't think much of chases unless we get something. I don't remember much about it now.

Q. You don't remember whether it was north, south, east, or west?

A. I can tell you what it was. We went off after the Newfoundland. We thought we saw them waiving a light, as if the prize master wanted something, and we went about half a mile and found it was nothing, and then went back to our place. That threw us

out of our place. I ran after the Newfoundland a mile or two until after the light was put down. As to chasing, we chase all the time—two or three newspaper tugs at night; spent over half a ton of coal chasing newspaper tugs, and we don't get anything.

In Reply.

Q. This matter of lights—what you have described as a faint light that you first saw—can you say positively that was the masthead light of a steamer?

A. It positively was not; it was not that sort of light. The navigating officer of the Mayflower boarded the Newfoundland and saw the light in the companionway which counsel has alluded to, and he probably can tell you that it was not a masthead light. It was not that class of light; it was a faint light; very bad.

Q. Was the masthead light burning when you came up to her?

A. As soon as we got in proper position all the lights were burning. My idea is—I had no idea her lights were burning until the captain told me they were burning.

Q. The masthead light—when did you see that?

A. When we got far enough ahead, two points abaft the beam, we saw all the lights—masthead light & starboard. The masthead light is visible—the law requires them to be visible five miles, and they are almost always better made in England. We have
117 some vessels with English lights. In our light-houses down here you can see them ten miles.

Q. How near where you when the masthead light was visible?

A. Within one hundred yards the masthead light showed 20 points on the bow; you go eleven points from the bow and you don't see the masthead light. Those lights were lit when we ran upon her and they had no electric light. Now, the point of suspicion was that we did not see them when we came from the eastward.

By Mr. BARKER:

Q. I want the captain to say, if he was in the wake of the vessel he would see no lights at all, that that would be in conformity with the vessel?

A. Yes; certainly so. The masthead light in port shows all around, but not when at sea. It shows only two points abaft the beam, ten points on each side.

By the DISTRICT ATTORNEY:

Q. In regard to those lights, from the position which my friends have placed her in and your position, in which he says she was running from a point east of north and south lines of Morro light, when she ran on a west course at eight o'clock, taking her position at eight o'clock, then running on a due west course from that point to the point of capture, would she not have passed in such position as you must have seen her lights?

A. You see, it is very close, they said, standing west by north for

a while. If west, we must see the light, but I would have to look at the diagram. If west by north, it is just on the verge of losing the light. (Refers to diagram.) If she is steering west from this position (indicating), we must see her lights, but west by north it would be just on the line. We might see and we might
118 not when she was here (indicating), but we couldn't see it along here (indicating). We must see that light if she was going.

By Mr. BARKER:

Q. I asked Capt. Mackensie to produce the telegrams he received about the Newfoundland.

A. (Telegrams handed witness by district attorney.) Looking over telegrams, my recollection is the telegram was July 6th. I don't find anything here of that date.

By the DISTRICT ATTORNEY:

Q. The position of the Newfoundland, according to the log-book memorandum, July 19th, 8.30, Havana light due south; distance, 10 miles, and from 10.30 p. m., same date, was 21 miles north-north-west half west of Havana. Will you inspect your chart and give the course steered between the points given?

A. I make it northwest by north.

By Mr. BARKER:

Q. Suppose it was 17½ instead of 10 and the point of capture 21 miles instead of 17½?

A. The course would be about due west.

Mr. Barker wishes to have noted an exception to all of the testimony of Captain Mackensie which refers to the position of the Tecumseh and the hour at which she met the Newfoundland.

119 *Testimony of A. E. Culver on Final Hearing.*

CHARLESTON, S. C., *August 31st*, 1898.

A. E. CULVER sworn by the district attorney:

Q. What position do you hold, if any?

A. Navigating officer of the Mayflower.

Q. What position do you hold in the navy?

A. Lieutenant.

Q. Were you on the Mayflower at the time of the capture of the Newfoundland?

A. I was.

Q. State in your own way all the facts and circumstances attendant upon that capture in your own language, giving your statement of the facts from your observation.

A. Between 8.20 and 8.30 p. m. of the 19th of July the Mayflower started in chase of something. I was not on the bridge at the time they sighted the light first, but very shortly after that I went up on the bridge. The time of starting the ship was about 7 miles from

Morro light. The Mayflower, it bore about south by west half west, I think, and when I went on the bridge we were standing north by west in the direction in which the light had been sighted. When I got on the bridge the light had disappeared. Shortly after that I made out the light myself. It was a very dim light, not a steady light, appearing and disappearing; did not remain very long in sight then. After standing on that course some distance north by west the light was sighted more to the westward and we changed our course, heading for it—heading about northwest—and after running perhaps 30 minutes the light appeared again southwest and we headed for it, and later on it appeared again somewhat to the northward and we headed for it again. I think we
120 changed the course three or four times. At about a quarter of ten or 20 minutes of ten we sighted the hull of the vessel and stood for the hull, gradually changing the course so as to keep it head on. I think we got around to north-northwest and when pretty close aboard we fired a blank charge. She came to very promptly, but at that time no lights had shown at all, except this light I mentioned.

In heaving to probably getting round somewhat and in our going ahead of her all of her lights suddenly showed—that is, her regular running lights. Our ship stopped at about 10 o'clock. I was sent over as the boarding officer to investigate her At that time the ship had been pretty well lighted; they had a light at the gangway to receive the boarding officer and the light showed from several portholes. As I went up on deck I noticed from 10 to 12 men leaning over the rail, I said to the captain first thing, "We have been chasing you a long while." He said, "That is strange; he hadn't seen us until we fired the gun." What was rather odd then was that all these men should have been up there fully dressed, a much larger number than the watch would have been, and they showed no evidence of having dressed in haste. They then, in order to show me over the deck, got a lantern from the vessel passageway aft, which I concluded was the lantern we had seen, and they took me into the captain's office or cabin, whatever it was, where he had all his papers ready; also the log. I saw from the invoices that the cargo was flour and general cargo of provisions; that the log stated the vessel had been boarded by the Tecumseh that evening; that the log showed no course after five p. m. or speed; that there were two separate clearances, one to Vera Cruz and the other to Kingston, all of which struck me as being somewhat suspicious. I then asked the captain a number of questions as to where he was
121 bound. He was very vague in his replies, sometimes saying Kingston and sometimes saying Vera Cruz. Finally I asked him if he was shaping his course by way of Cape San Antonio, and he replied he hadn't made up his mind. I then asked him what speed he was making, and he replied that from the time he was boarded by the Tecumseh until he was boarded by us—that is, overhauled, he meant—they were making eight knots; that the speed had originally been nine knots, but finding himself somewhat short of coal he reduced his speed to eight. Taking all those things into

consideration, I concluded that the question was at least suspicious and asked him to go with me on board the Mayflower, where he could see her commanding officer, which he did. Upon returning to the Mayflower I took the bearing of Morro light, which was, I believe, south-southeast half east. I estimated the distance to be between 17 and 19 miles.

By Mr. BARKER:

Q. Before the prize had left you?

A. Yes; the captain was still on board the Mayflower. Quite a long conversation took place in the cabin of the Mayflower, and, as I recollect, the master of the Newfoundland stated that he was going to Vera Cruz. He said nothing about having been bound for any Cuban port, but Kingston and Vera Cruz were the ports of destination. As I was going out of the cabin on deck to see after various things, what I heard down there was disconnected; I can't really tell what the conversation was. I do remember when the captain said he was going by way of Vera Cruz, because I directed his attention to the fact that on board of his own vessel he had stated to me he hadn't made up his mind whether he was going by way of Cape San Antonio, and he said that he had misunderstood the question.

At about midnight, Ensign Pratt having been sent on board
122 with the prize crew, the Newfoundland started off.

The following morning the Tecumseh came within hail; her commanding officer was signalled to come on board. He testified to the fact——

By Mr. BARKER: Don't say what anybody else says.

A. I was summoned to hear what he said as a witness.

By the DISTRICT ATTORNEY:

Q. What is the limit of visibility of Morro light from the Mayflower?

A. I suppose it is 22 miles; it is rather difficult to tell the exact limit.

Q. I notice by the chart it is laid down at 18 miles—fifteen feet above the water level?

A. I reckon from the eye twenty-five feet above the sea, and that would bring it up to 21 miles—that is, on the bridge of the Mayflower.

Q. Do you know the height of the bridge of the Newfoundland?

A. No; I do not.

Q. Is that or not as high as the bridge of the Mayflower?

A. I should think probably lower; but I didn't go on the bridge; in fact, I don't know that she has a bridge. Probably she has some sort of a place over the deck-house. I didn't go on it.

Q. The Mayflower is high out of the water?

A. Rather high.

Q. When you sighted this faint light after coming on board, could you estimate the distance that light was from the Mayflower when

you first went on board the deck? The chase had begun and the light was not in sight when you first went on the Mayflower's deck?

123 A. Yes.

Q. When you first saw it when you came on deck could you estimate the distance from the Mayflower?

A. In the neighborhood of three miles; hard to tell within a mile or two exactly.

Q. Can you say what kind of a light it was?

A. An ordinary lantern, from the way it appeared; either that or a light in the port.

Q. Could it possibly have been a masthead light, running light, on the steamer at a great distance?

A. I think not.

Q. Speaking of it as a faint light you don't mean a distant light, but a small light?

A. Rather an inferior kind of light.

Q. When you went on board the Newfoundland you say the master took down a lantern to show you around?

A. Yes.

Q. Where did he take it from?

A. As I recollect, it was hanging in the after passageway that led to his office, which had a door opened athwart ship.

Q. Was there any other lights in that section of the ship than this lantern he took down?

A. The light hanging in his office.

Q. That was forward of this?

A. Perhaps 10 feet forward or 5 feet. I think it was an ordinary ship's lantern.

Q. Was there a skylight to his office?

A. I didn't see any.

Q. This lantern he took down was hanging in the after passageway?

124 A. Yes.

Q. And the door opened athwart ship?

A. Yes.

Q. Was there any bulkhead that would prevent that light from showing directly in the rear?

A. Yes; it could only have shown on each side. I think there was a door on the opposite side to that which I went in; it could not show but directly forward or directly aft.

Q. How far either forward or to the rear of the line directly abeam could that light have shown through this door?

A. Two points either forward or abaft the beam.

Q. About the same as the running lights?

A. Yes; that is aft, not forward; the running lights are seen all the way from forward.

Q. But the ship's lights are abeam; we see the running lights, but more than two points they would not have shown?

A. I think those lights would have disappeared about the same time the running lights would have disappeared

Q. You say that was an ordinary lantern?
A. Yes; a hand lantern.
Q. How long before you overhauled the Newfoundland before you hove to; how long before that had you last seen this faint light?
A. I don't remember; I don't think we saw it any of the times we saw her hull. I really can't recollect that point; my recollection is, when I first made out her hull I saw no light.
Q. What time was it the Newfoundland left the Mayflower to go with the prize crew?
A. Near midnight.
125 Q. Still dark?
A. Yes.
Q. Did you see her as she was going away?
A. Yes.
Q. How about her lights then?
A. Two or three small lights were visible as she went away. I didn't watch very long. I went below immediately.
Q. Did you make any sketch showing the position of these vessels?
A. Yes; I made a tracing.
Q. At what time did you make that tracing?
A. On the forenoon of the 20th of July.
Q. The next morning after the capture?
A. Yes.

By Mr. BARKER:

Q. That was after the conversation with the officer of the Tecumseh?
A. Yes.

Mr. Barker objects to the introduction of the sketch, based upon the hearsay information received from the officer of the Tecumseh.

A. The only part of that sketch which would come under that heading is the location of the Tecumseh; all the rest of the sketch has nothing whatever to do with it. I will make this statement: I made the tracing based on the bearings I myself took; located the ship at the time we sighted this light and located the ship at the time we overhauled the Newfoundland—I thought our run was between those two points—and then added the position which was given to us and is indicated there in dotted lines by the officer of the Tecumseh; it had nothing to do with the rest of the work.

126 By the COURT: I will take the sketch for what it is worth.

By the DISTRICT ATTORNEY:

Q. Those red lines, what do they represent?
A. The full red lines represent the two bearings which we took of Morro light—the one when the light was first sighted and the one which is put down as south-southeast half east, after the Newfoundland had been boarded, and the dotted red lines indicate approx i

mately what the line of the Mayflower was. That is an approximation.

Q. Then that little black circle in the red lines?

A. The black circle, the lower one, is the Morro light. The small black circle to the right of that is our estimated position of the Newfoundland when first sighted, and the upper black and red circle is her position when overhauled.

Q. You spoke about the master having his papers ready. What papers do you refer to and in what position were they?

A. He had them in his office—clearances, invoices, and log—the ordinary ship's papers.

Q. Whereabouts were they?

A. I think on his desk or near it.

Q. And all together?

A. The log was separate.

Q. Did you call his attention to any of the log entries at the time?

A. No.

Q. Was anything said by him about where he had come from?

A. Yes; he said he had come from Halifax. He stated to me he had been boarded by the Tecumseh and some other vessels.

127 Q. Did he state to you anything about his having intended to enter any Cuban port?

A. Nothing.

Q. You said something about the captain having said to you that he had to reduce his speed.

A. From 9 to 8 knots.

Q. Did he say when he began to reduce his speed?

A. I am not positive. I think he reduced his speed after going through Crooked Island channel. I think something he said led me to infer it was the time he was first boarded. That was after he got down there.

Q. Did you notice anything about the condition of the steam at the time of the capture?

A. No.

Q. You spoke about the men being up there and hanging over the rail when you boarded the vessel. About how many did you see?

A. Ten or twelve.

Q. What would be the ordinary size of the watch of a vessel of that size?

A. I have enquired since, and four or five. I knew the number I saw was much larger than the number would be for a vessel of that size.

By the COURT:

Q. What time does the sun set in that latitude?

A. Not far from six o'clock.

Q. Then it was twilight?

A. There is practically no twilight; perhaps between six and half past six.

Q. It is dark, then, by half past six?
A. By seven it would be dark. As I remember, we had twilight at seven, and at half past seven it was pitch dark.

128 By the UNITED STATES ATTORNEY:

Q. The twilight in that latitude is not as long as in northern latitudes?
A. No; there is very little twilight.

129 *Testimony of W. V. Pratt on Final Hearing.*

W. V. PRATT sworn.

By the DISTRICT ATTORNEY:

Q. What position do you hold?
A. Ensign in the United States Navy. I am serving as watch officer on the Mayflower.
Q. That was at the time of the capture of the Newfoundland?
A. I am ordered to the ship as watch officer.
Q. Were you present at this capture?
A. I was.
Q. State to the court in your own language the circumstances and facts that came under your observation.
A. At about twenty minutes after 8, while I was officer of the deck of the Mayflower, heading east-northeast Morro light, bearing south by west half west, I picked up a small light bearing north by west from us, or a point forward of the port beam. I reported the same to the commanding officer, and he ordered the ship headed for it north by west and the engines rung ahead full speed. Shortly after heading for it we lost the light, but stood on the course about 20 minutes; still not seeing it we put on forced draft, running 135 turns, and about that same instant picked this light up again, a little to the westward, so that by altering our course to head forward again, we were heading north-northwest, the light very shortly disappearing, we changed our course gradually to the westward, until we were heading, possibly, as far as northwest, and we stood on that course about 30 minutes, still not seeing this light. About 9.10 we suddenly sighted the light again bearing southwest right on the port beam and inshore of us. We headed for it again and stood on until about half past 9, when we suddenly saw the light outshore of us and right on our starboard beam; we headed
130 for it again and went to general quarters; my station being below deck, I left the deck, but up to that time I had seen nothing about the ship, no lights except this small light that showed at intervals. When the gun was fired I stuck my head above the hatch and I saw then very plainly that she was lighted; could see the ship very plainly.

By Mr. BARKER:

Q. You ran in front of her?
A. She was lying on our beam then; I couldn't tell how she was

heading or how we were heading. I had been off the bridge half an hour.

By the DISTRICT ATTORNEY:

Q. Did you go aboard of the Newfoundland then?

A. Not then.

Q. You didn't go with the boarding officer?

A. No.

Q. When did you first see the captain of the Newfoundland?

A. I saw him in Captain Mackensie's cabin when I went to get my orders.

Q. Did you have any conversation with him then or hear him say anything about the matter?

A. No; I had no conversation, and I didn't pay any attention to what he said.

Q. When you first picked up this light what did you judge the distance to be from the Mayflower? You were the one who first picked up this light.

A. I gave her 2 miles, or possibly 3 miles, distant; not more.

Q. And what was the character of the light?

A. It seemed to me a poor kind of light, an ordinary kind of light. I didn't take it for a running light at all; it didn't
131 have that character.

Q. You would lose it and pick it up from time to time. Could you identify it as having the same appearance?

A. Yes; I didn't see any difference. I was pretty sure it was not a running light. Had it been a white masthead light I could have seen the side lights, green and red, which I did not see.

Q. After the Newfoundland was captured, were you placed in charge of her?

A. Yes; I was sent on board as prize master.

Q. Did you have any conversation after that with the captain in relation to his voyage?

A. We had several conversations on our way up and at various times, but the first thing we did was to start the Newfoundland off for Charleston, where she was to be brought in, and for that purpose we took his chart and laid the courses off.

Q. You used that chart in sailing from there to Charleston?

A. Yes; I used that except the harbor chart of Charleston harbor, which we got from Captain Mackensie on the Mayflower.

Q. What, if anything, did Captain Malcolm say to you about his voyage—where he was going to go?

A. I think about the second day we were talking it over, and he said he was bound for Vera Cruz, and said he come down the Crooked Island channel, which was not out of the course, to avoid the strong Gulf stream. I asked if he went for Kingston and Vera Cruz, why not go to Kingston and take advantage of the west current, and then in coming back he would take the current both ways, and he said perhaps he was rather foolish, and that he would — so if he had to do it again, so there was no question in my mind that

he was going to Vera Cruz. We talked it over at various times in a pleasant sort of way.

132 Q. About the lights in the Newfoundland, just describe, if you will, the interior of that vessel—I don't know the nautical terms—the rear part of it.

A. In the rear part below the upper deck was taken up with mess-room and cabin of the captain, and also the steward's room and the ordinary air ports around the side of the ship, and while I was on board we always kept a light burning below; then leading down to this place was a square deck-house with 2 doors leading in right from each side, port and starboard side; could go in either way; then the test of the space forward was devoted to the cargo and engines space, and then a small space for the second officers and engineers, then cargo space forward of that, and then crew space, and after that the peak.

Q. Lieutenant Culver said when he was aboard that there was a lantern hanging which the captain took down to show him the way——

A. I can draw a little sketch of the after deck-house.

Q. What I want to know is about how that lantern would show from outside.

A. It would show abeam on each side.

Mr. Pratt makes a sketch of the deck of the Newfoundland, which he explains to the court.

Q. With that light hanging as you describe it in there, what position would a person on the outside have to be in relative to the ship to see it from the outside?

A. He would have to be pretty nearly abeam.

Q. Could it be seen and she not show her side lights or running lights if they were lighted?

A. No; I don't think it could.

Q. You think, then, that in order to see that a person would have to be in such a position that the running lights would show?

133 A. I should think so, because the running lights show abeam, 2 points abaft the beam.

Cross-examination by Mr. BARKER:

Q. Had the Mayflower changed her position up to 8.30 that evening?

A. My testimony on that would only be hearsay. I only came on watch at 8 o'clock; we were steering east-northeast from the time I came on watch.

Q. Under steam?

A. Moving slowly, at half speed.

Q. What is your half speed.

A. I think about—we had been going slowly. I suppose we were going possibly 6 knots.

Q. Steering east-northeast?

A. Yes.

Q. Is there a current there?

A. At that time practically no current; we hadn't any for a month out shore. I sometimes thought 15 miles out we might get a very little easterly current, but inshore of that we generally count on a little westerly set or none at all close to the shore.

Q. Had you taken any observation by which you could determine what her position was at 8.30 p. m. on the evening of the 19th July?

A. I had been told to take bow and beam bearings of the Morro.

Q. Is that from a vessel in motion a sufficiently accurate means of determining distance?

A. That is the only way of taking bow and beam from a vessel in motion.

Q. I want to know how near it would come to guess—how near it would come to accurate measurements.

A. It ought to be true within a quarter of a mile—half a
134 mile from a vessel in motion. If the log is good and certain of the lights, a quarter to half a mile should be pretty close.

Q. Have you the log of the Mayflower here?

A. No.

By Mr. BARKER: I asked for the log of the Mayflower Saturday, and I still ask it to be brought. We want to see it.

By Mr. LATHROP:

Q. I want to know how far to accuracy is a bow and beam bearing observation in enabling you to calculate the distance.

A. A good allowance is half an hour; but I was going on to say further—I hadn't completed my answer—that I hadn't completed my bow and beam bearing. We had started to take it when I sighted this light.

Q. Have you any other data by which you could determine how far from the Morro you were when you saw this faint light?

A. Yes; I took a bearing of the light as soon as I sighted the vessel, and 35 days running on a blockade enables you to tell pretty well.

Q. Your calculations from your habit of seeing them is not as good as the log?

A. Not quite.

Q. Was that observation you took bow and beam?

A. I took a bearing and estimated in my own mind from previous experience.

Q. Your first course, I understood you, after you saw this small light was north by west?

A. Yes.

Q. That means one point north of west?

A. Yes.

Q. How much is a point?

135 —. 11¼ degrees.

Q. How long did you run on that course?

A. About twenty minutes.

Q. Then, I understood, you lost the light?

A. I lost it before I finished.

Q. You continued the course after you lost it?

A. Yes.

Q. After that 20 minutes expired what course did you take?

A. We ran to north-northwest and shifted gradually until about northwest. Changing gradually, we sighted the light again.

Q. How long did you run on that course?

A. About 30 minutes; half an hour.

Q. Did you see the light after you got on that course?

A. Not longer than a minute or two.

Q. How was the light bearing towards your ship at that time?

A. Right ahead. We headed for it.

Q. In that position could you have seen her running lights?

A. I should certainly think I could.

Q. Is it not fair to assert that you could not have seen them, fixed as they are on the ship? Those running lights are not visible two points abaft the beam.

A. In the first place, I want to know what lights you mean.

Q. The running lights spoken of by Captain Mackensie and Lieutenant Culver—the regulation lights on the masthead and sides of the vessel. I believe that they are regulation lights, recognized by the American Navy and merchantmen and the British government.

A. Yes. You mean to ask, Is it not possible that the ship
136 may have *have* been in such a position that you couldn't see the running lights?

Q. If he were running away from the Newfoundland, the Mayflower in *in* her wake, could those lights be visible?

A. If I was heading north-northwest or northwaest, and she was running directly away, I couldn't see them if she was running on a westerly course.

Q. Then there would be some question. It is not absolutely certain if a ship in that position, the regulation lights 2 points abaft the beam, could or could not be visible to you on the course you were?

A. No; it would depend greatly on her heading.

Q. If she had been heading west, would those regulation lights have been visible to you running on that course?

A. If she was heading west—I can tell you that in a moment. Her lights would just be visible in direction from her south-southeast—that is, 10 points; if she was heading west her side light would show from the south-southeast bearing, just begin to show—that is, 10 points if heading west. If I was going north-northwest I would just be getting in the range of her light, just on the edge of it.

Q. How long after you lost the light do you think you ran on that 20 minutes' course?

A. Which time when I lost it?

Q. The second time course.

A. I should say we must have been running a good 25 minutes without seeing the light.

Q. If in that 25 minutes we will suppose the ship had been going west, what would have been her position to you running north?

A. She would have run ahead of us, run over to the left.

137 Q. And the side lights would not be visible?

A. No.

Q. After the second course that you ran, as described by you, the first course was about 20 minutes; the second about 30. After that, what course did you take?

A. We ran on this 30 minutes, until I opened the light on the port beam again.

Q. That second course, 30 minutes, you ran until you opened that light on the port beam?

A. Yes; and then headed directly for it.

Q. That involved your changing your course to right angles?

A. Yes; about southwest.

Q. How long did you run on that course?

A. As near as I can estimate, 20 minutes.

Q. At the end of that 20 minutes, what did you do?

A. We sighted the light again.

Q. In what direction from you?

A. Right on our starboard beam.

Q. And you then changed your course at a sharp angle for it and headed for it?

A. Yes.

Q. Not an absolute right angle?

A. Pretty near; somewhat near it.

Q. You changed again, and how long did you run on that course?

A. I couldn't say; I went below then.

Q. As soon as you saw her, I understood you to say the orders were——

A. To head for her.

138 Q. Under full steam?

A. Yes.

Q. How long did it take to get up full steam?

A. To run up to 100 turns would possibly, running as we were—we would get up to it in 5 minutes.

Q. How long a time did it take—you were running at about 6 knots an hour then—from the order to run for her at full speed, how long did it take the Mayflower to get up full speed? What is your full speed?

A. I think she can make 15 knots.

Q. Not more?

A. I have not seen here make more. She may have been doing a little better that night; she did better that night than before; she made 24 turns; that was in spurts, not steady.

Q. From 6 knots to 15; not more. How many minutes?

A. I would say from half speed, at which we — running to get up to ordinary full speed, which would be 12 knots, possibly 5 to 10 minutes, and then up to the increased speed of 15 knots it was 20 minutes more.

In Reply.

Q. If the Newfoundland had been steering a west course to reach the point at which you first saw that faint light, would you or not have seen her running lights before she reached that point?

A. If the Newfoundland had been steering a west course at the time I saw her, at 8.30——

Q. Previous to that time, when you first saw the faint light, if she had reached that point by steering a west course she came from the east?

A. Yes.

Q. Would you or not have seen her running lights from the Mayflower?

139 A. If she was heading west her masthead light would be visible anywhere from west to south-southeast. She was bearing from us, when we picked her up, north by west, the reciprocal bearing south-southeast; consequently I would have seen it. I am then one point on the visibility of it. It all depends on her heading, entirely, not on our heading. If she was heading west when we picked up this slight light, her lights would be visible all the way from west to south-southeast.

Q. My question is, she having come from the east?

A. I could have seen it before.

Q. Before she reached that point her running lights would have been visible if she had been steering a west course?

A. The masthead light, of course.

Q. Did you see the running lights of another vessel coming from the eastward of the place where you picked up this faint light?

A. No; I shouldn't say I did.

140 *Testimony — G. R. Evans on Final Hearing.*

CHARLESTON, S. C., *September* 1, 1898.

G. R. EVANS sworn.

By the DISTRICT ATTORNEY:

Q. What position do you hold in the service?

A. Lieutenant, junior grade.

Q. What command did you have in July last?

A. Command of the U. S. S. Tecumseh.

Q. Where were you stationed about the 18th or 19th of July?

A. Off Havana, with Morro light bearing between southwest by south and southwest by west.

Q. Did you sight the steamer Newfoundland while on that station?

A. I did.

Q. When was that?

A. In the latter part of the afternoon of the 19th July, about 5 o'clock.

Q. Where was she when you sighted her? What was her position relative to the Morro light?

A. Bearing to the northward and eastward very near, probably nearer to *to* the eastward.

Q. State what you did and what was done by your vessel when you sighted the Newfoundland.

A. The vessel when first sighted appeared to be a schooner; later, she appeared to be a vessel under steam and sail. I ran in towards her about 20 minutes or half an hour before bringing her to. I then sent the mate on board with the usual instructions to examine her papers, question her commanding officer, and report to me.

Q. Can you fix the time that you boarded her?

A. I remember it was about 5 o'clock, because as soon as
141 we started after that vessel I went down below to get my dinner. I was down there probably 15 or 20 minutes when it was reported to me we were very near the vessel.

Q. Can you give her position at the time of boarding?

A. At the time of boarding her I estimated her position to be about latitude 23.15 north, longitude 82.13.

Q. Look at that tracing and see whether you can trace her location on that tracing. (Hands paper to witness.)

A. The location that is placed here inside of the large dotted circle is approximately the correct position of the vessel at the time of boarding.

Q. In what part of the large circle?

A. I should say about the center of the circle; it was within that circle. I wouldn't place her position closer than 3 miles.

Q. But within that circle?

A. Unquestionably within that circle.

Q. You say, then, it was about 5 o'clock when you started in chase and you were 25 minutes to half an hour before boarding?

A. I should say that was the time.

Q. How long was she detained by you?

A. I should say half an hour.

Q. Did you notice in what direction she sailed off?

A. She sailed off on a course northward to westward. The mate cautioned her if she wanted to avoid the blockading vessels she must go northward of west and she started on that course.

Q. I suppose it was then daylight when you boarded her?

A. Yes.

Q. How long after that could a vessel be seen by daylight there?

A. I should say the vessel could have been seen by means
142 of night glasses three-quarters of an hour later.

Q. As a matter of fact, did you keep watch of her or not or pay further attention to her after she left?

A. I didn't keep watch of her any length of time. I saw she stood off clear of the coast and was apparently all right.

Cross-examination by Mr. BARKER:

Q. Previous to your sighting the smoke of this vessel on the 19th, what was your position, the Tecumseh, in reference to Havana

light? I don't mean the bearing; you have given that; I mean the distance and the distance from shore.

A. Previous to sighting the sails of the Newfoundland——

Q. You saw the sails first?

A. Yes; we took her to be a schooner. Previous to sighting the sails, I was about 6 or 8 miles to the north and eastward of Havana light.

Q. How far from shore in a direct line?

A. Probably 3½ miles from the nearest shore.

Q. Was that your usual place?

A. At that time that was my usual position, drifting with the current, maintaining a position between the bearings that were prescribed.

Q. What were those bearings?

A. At that time southwest by south and southwest by west; Havana light between those bearings.

Q. Were you under steam?

A. Yes. At the time of sighting the light I was probably drifting, the engine not turning over, or I might have been steaming very slowly—just turning over.

Q. After you saw the light, what orders were given in regard to the steaming of your vessel?

143 A. To head for the vessel and proceed as fast as possible.

Q. What is your full speed?

A. At that time it was about 10 knots.

Q. Ordinarily is that her full speed on passage?

A. The usual speed of the vessel is between 9 and 10 knots.

Q. At that time in what direction was the sail moving?

A. She was standing to the westward; she might have been standing a little to the southward of west, but her course was about west at that time.

Q. Was your vessel visible at that distance from her?

A. Yes.

Q. Did she change her course while you were moving towards her?

A. As near as I saw, she kept the course until I got close, then she ran to us. I could have gone alongside without lowering a boat, if I desired.

Q. And you estimate it took you from 20 minutes to half an hour to go from the point where you sighted her to the point where you met her?

A. I do.

Q. Those calculations that were referred to on that chart as designating the probable position of the Newfoundland at the time you met her, were they taken by observation?

A. They were not; they were estimations.

Q. You said it was about 5 o'clock; did you make any note at that time, any memorandum of your own or the vessel's, at what was the hour you sighted her?

A. It was recorded in the official log of the ship.

Q. Have you that with you?

A. I have a copy of the log from 4 to 8 o'clock.

Q. Have you it here with you?

144 —. Yes (handing copy of the log to Mr. Barker). "4 to 8 p. m., fair weather. At 5.15 sighted stray steamer to the eastward; stood over to her. She proved to be the Newfoundland, of Montreal. From board bearing at 5.35 she proved to be bound *for* Halifax to Vera Cruz and Kingston, Jamaica, with general cargo. On overhauling her papers, found her register endorsed by the Hudson. The Badger endorsed her log, with warning latitude and longitude."

Q. You advised the captain, I understood you, if he wished to avoid any encounter with the blockading fleet to bear off—not to go any nearer the shore?

A. The mate reported he had so advised the captain.

Q. It was not you?

A. I did not board the vessel.

Q. And you say he did, after he left, take a course north of west?

A. Yes. I think his course was about west by half north; to the northward of west.

Q. She was on that course when you left her, about 6.30?

A. When I left her, in the vicinity of 6 o'clock.

Q. You were with her half an hour. You came to her at 5.35, and you were together about half an hour.

A. Yes; and we would have separated in the vicinity of 6 o'clock.

Q. She got under way?

A. At once.

Q. You made no comparison of your time with the Newfoundland's?

A. No.

Q. What course did you steer after you left the Newfoundland?

A. I stood leisurely back on about a southwest course.

Q. In the direction of Havana light?

145 A. The general direction of Havana light.

Q. As you pursued this course, this vessel was for some time visible?

A. Yes.

146 *Testimony of A. R. Nickerson on Final Hearing.*

A. R. NICKERSON sworn.

By the DISTRICT ATTORNEY:

Q. What position do you hold in the service?

A. Executive officer of the Tecumseh.

Q. Were you present at the sighting of the Newfoundland off Havana light?

A. I was.

Q. State in your own language your knowledge of what came within your observation.

A. The vessel was sighted northward and eastward; at 5.15 we started chasing her; we boarded her at 5.35 exactly; returned on

board our ship about 5.50 ; was absent from our ship a little better than 10 minutes, not more. I found her papers had been registered by the Hudson and the Badger, and I endorsed the log and warned the captain if he wished to avoid further trouble with the blockading fleet to keep to the north and west.

Q. Is that your endorsement (handing log to witness)?

A. Yes.

Q. Did you have any conversation with the captain of the Newfoundland at the time?

A. Nothing more than that he told me he had sighted different ships, and had been overhauled by the Hudson and the Badger, and he asked if there were a number of ships to the westward of our position, and I told him 30 or along there; that — might have been a few more than there was, but there were quite a number.

Q. Was anything said about his destination—where he was making for?

A. Not that I remember. His clearance papers showed that he was bound for Kingston and Vera Cruz.

Q. You don't recollect that he said anything about his destination?

A. Not that I remember.

147 Q. Can you locate the position of the Newfoundland at the time that you boarded her?

A. Within 3 miles.

Q. (Handing tracing to witness.) Find it on that.

A. The centre of that circle is within 3 miles.

Q. What was your position at the time of the sighting the Newfoundland relative to Morro light?

A. 6 to 8 miles from the light and about 3½ to 4 miles from the nearest shore.

Q. What direction was Morro light bearing from you?

A. About southwest; it may have been a little either side of it.

Q. How far was she from you when you sighted her?

A. I should say 9 miles.

Q. And in what direction?

A. Northward and eastward.

Q. And what course was she sailing?

A. Apparently steering west.

Q. Can you estimate the distance that the Tecumseh sailed from the place she was lying at the time you sighted her until you ran up to board her?

A. I should say a little better than 4 miles, in the time we were running.

Q. And in what direction did your vessel sail?

A. Northward.

Cross-examination by Mr. BARKER:

Q. You were 6 miles, you think, from the Morro?

A. Between 6 and 7 miles from the Morro.

Q. Call it 6½, and you saw her 9 miles off, you think?

A. Yes; about that; maybe a little closer to 8 than 9.

Q. That would put her 15 miles from Morro when you saw her?

148 —. 14½ to 15 miles.

Q. How far would that locate her from the shore?

A. About 8 miles.

Q. Did you see her after you left the Tecumseh?

A. For, I suppose, about 10 minutes.

Q. That is, she was only visible to you for that time?

A. It began to settle down dusk then.

Q. When was the latitude and longitude mentioned on that chart taken?

Q. The position was corrected at noon time by cross-bearings.

Q. That put down on the chart is that taken by observation?

A. No; from bearing in the tower.

Q. That latitude and longitude——

A. That latitude and longitude, the position at the time of overhauling, is estimated—estimated from 12 o'clock aboard of our ship.

Q. If you are able to state the latitude and longitude, why can't you state exactly her position instead of stating it within 3 miles?

A. You see, we had run 4 or 4½ miles and a big heavy set of current from the Gulf stream close in shore.

Q. Running eastward from west?

A. The current was running east; we were running northeast. The current was running to the eastward.

Q. During the 10 minutes after you left her, what course was she apparently pursuing?

A. She apparently stood one or two points to the north of west.

149 FOR RESPONDENT.

Testimony of Capt. F. N. Malcolm on Final Hearing.

Captain F. N. MALCOLM sworn.

By Mr. BARKER:

Q. What vessel do you command?

A. The Newfoundland.

Q. How long have you been connected with that vessel?

A. I joined her the first of July of the present year.

Q. Were you with her on any previous trip than the one now discussed?

A. This is my first voyage in the ship.

Q. Who put you in charge of that vessel?

A. Captain J. A. Farquhar.

Q. What was his relation to the vessel as you understood at that time?

A. I understood he was the owner of the ship.

Q. He was the managing owner?

A. As far as I understood, he was.

Q. At the time you were put in charge of the vessel was she not chartered?

A. I did not see the charter-party until some time after I was put in charge of the ship, but I know when I did see it. I saw it was executed between J. A. Farquhar and Musgrave & Co.

Q. Look at that paper and say whether that corresponds with your recollection of the charter-party you saw.

A. Yes; I think this is the same one or a copy of it.

Q. What is the date of it?

A. 29 June, 1898.

Q. Who is she chartered to?

A. Musgrave & Co.

Q. Of what place?

A. I don't see their address here—yes; here it is, Halifax, N. S.

Q. In print?

150 A. Yes.

Q. Who is she chartered by?

A. James A. Farquhar.

Q. Does the charter-party read, "To be employed in such lawful trades between several port or ports in British South America not north of the River St. Lawrence, and the United States of America, and the West Indies and Central America and the Caribbean sea and the gulf of Mexico and South America not south of the River Platte"? Each of those "ands" have an "or" underneath it.

A. Yes.

Q. All in print?

A. Yes.

Q. The words following are in manuscript: "Including Cuban open ports no contraband of war to be shipped, charterers to insure vessel against capture and (or) seizure to her full value at their expense"?

A. That corresponds with this.

Q. You find those words in the charter-party?

A. Yes.

Q. Did you receive any instructions from Capt. Farquhar, owner of the vessel, in regard to her disposition?

A. I did.

Q. State what they were.

A. He told me that I was to carry out the terms of the charter-party, and he told me not to — into a blockaded or attempt to go into a blockaded port; he told me that, not to go near the blockade.

Q. Where were you when that conversation took place?

A. On the Newfoundland.

Q. After taking charge of her?

A. Yes.

151 Q. Whose instructions did he tell you to follow?

A. To carry out—follow out the instructions of the charterers, Musgrave & Co., also the instructions of the shippers, Robinson & Co., if such instructions were not at variance with the terms of the charter-party. I think those were the words he used.

Q. Did Musgrave & Co. give you any instructions?

A. Musgrave & Co. instructed me to carry out the instructions of Robinson & Co., where those instructions were not at variance with the terms of the charter-party.

Q. Where were Robinson & Co.?
A. I understood they were at Montreal.
Q. You never saw them?
A. No.
Q. How did you receive instructions from Robinson & Co.?
A. Through Capt. Farquhar; he had a letter in his possession from Robinson & Co., which he showed me. It contained instructions from them as to the voyage.
Q. What were those instructions?
A. As near as I can remember, they stated that they had taken the ship for the voyage—I am not sure about the language—and that I was to clear the ship for Kingston and Vera Cruz, and that when the ship was loaded I was to proceed with all haste to the north coast of Cuba and enter either the port of Sagua la Grande or Caybarien and there deliver the cargo to the order of the shippers. If those ports were blockaded I was not to enter or attempt to enter, but I was to proceed to Kingston, Jamaica. That is as near as I can remember.

Q. When was the cargo taken on board?

152 A. Between July 1st and July 9th.

Q. I forgot to ask you whether that letter of Robinson Co. read to you by Capt Farquhar was given to you by Capt. Farquhar; whether you had it in your possession.
A. The letter was given to me to read.
Q. Was it retained by you?
A. No; I returned it to Capt. Farquhar after reading. I read it over twice.
Q. What course did you take?
A. A southerly course at first. Then I steered down for the Crooked Island passage.
Q. You steered for the Crooked Island passage after or before you crossed the Gulf stream?
A. After I crossed the Gulf stream I shaped the course for the Crooked Island passage.
Q. After passing through Crooked Island passage what course was taken by you?
A. I shaped my course to the westward to pass through the old Bahama channel.
Q. Was that in the direction of Sagua and Caybarien?
A. It was.
Q. Did you keep any record of any kind of the sailing—of the progress of that ship from Halifax?
A. I did.
Q. In what way?
A. I put the ship's position on the chart every day.

Q. You had a chart of your own?

153 A. Yes.

Q. And you put on that chart every day the position of your ship?
A. I did; I also kept a book I used for working the chronometer

sights and meridian altitudes, and I kept that book. I have that book still on board.

Q. From that memorandum book you put on the chart the position of the ship every day?

A. The ship's position on the chart from that book.

Q. After leaving Crooked Island channel and bearing westward in the direction of Caybarien and Sagua, into what waters did you yet?

A. I got into the old Bahama channel first. That was the first channel I got in.

Q. How close does your course at that point carry you to the shore of Cuba?

A. If I was in mid-channel I would be about 4½ miles from the Cuban coast—in mid-channel in certain places in the channel not more than 4½ miles.

Q. About what point did you encounter the first blockader?

A. I spoke the U. S. S. Badger. She boarded me about 14 or 15 miles off Maternillos point, Cuba.

Q. Is that point on the coast of Cuba or on an island north of the Bahama channel?

A. On the coast of Cuba, at the entrance to the harbor of Neuvitas, about the entrance, I think; I think it is on the west entrance to Neuvitas.

Q. Did you submit your ship's papers to the boarding officer of the Badger?

A. I did.

154 A. I did.

Q. Did he make any memorandum upon any of the ship's papers?

A. He endorsed the ship's register.

Q. Is that the ship's register (indicating)?

A. Yes.

Q. Look on the back; is that the endorsement?

A. Yes; the endorsement made by the boarding officer of the Badger.

Q. Do you recollect his name?

A. Lieutenant Titus.

Q. Read it.

A.—

"OFF NEUVITAS, CUBA, *July* 18, 1898.

I hereby certify that I have this night boarded and examined the British steamer Newfoundland, bound from Halifax, N. S., to Vera Cruz and Kingston, Jamaica. I find her papers to be in accordance with the requirements.

EDWARD McC. TITUS,
Lieut. U. S. Navy, Boarding Officer from U. S. S. Badger,
Commander Albert S. Snow."

That is what is on the register.

Q. What time is that?

A. About one o'clock in the morning.

Q. Before daylight?
A. Yes.
Q. Did you see the Badger before she boarded you?
A. I did.
Q. What lights?
A. She had no lights when I first saw her, but I sighted her first on our starboard bow, probably quarter of a mile distant.
155 She came around, crossed our bow, and steamed up towards me on the port side, and when within 200 yds. she flashed some lights on the foremast. I didn't know what they were, and she then passed astern of us and turned round and stood off of us, and then after she had been in that position a little time she fired a gun.
Q. What course were you then sailing?
A. I don't remember the course west; I don't remember whether due west or not. I spoke the ship when the gun fired and the boarding officer came on board.
Q. Did you ask him any questions?
A. I did; I asked him about the blockade in Cuba, and he told me the whole island of Cuba was blockaded.
Q. Were your lights up at that time?
A. My lights were burning.
Q. What lights?
A. The customary lights; the lights prescribed by the board of trade for steamships to carry when under way—the masthead light and two side lights.
Q. Were those lights of any very strong lens power?
A. No; not very strong lights; just the ordinary lights used aboard steamers.
Q. How far was the masthead light required by regulation to be visible?
A. 5 miles.
Q. How far were the side lights visible?
A. The side lights were required to be visible at least 2 miles.
Q. Could the commander of the Badger have seen you unless your lights were visible?
A. Oh, yes.
156 Q. At that time?
A. He could have seen me, because I saw him and he had no lights.
Q. You saw him how far off?
A. I don't know; I should say a quarter of a mile when I first saw him.
Q. Not 2 miles?
A. No; not that distance; that night you might have seen the ship half a mile without lights.
Q. More than that?
A. I don't think you could see the hull of the ship more than half a mile that night, especially one of the blockading ships; they are painted lead color. He might see my ship before I could see his.
Q. Your ship was larger?

A. Not larger, but she is painted black.

Q. Did you ask Lieutenant Titus, before leaving, any further questions?

A. I did. I asked him if there was any danger in my going west, when he told me that the whole coast of Cuba was blockaded.

Q. After he told you that?

A. Yes. I asked if there was any danger in my going west. He told me no; that there was no danger whatsoever, and that whenever a ship spoke me or boarded me to show all my papers.

The district attorney objects to the witness stating what is told him.

Testimony rules out as incompetent.

By the COURT: If the Government has offered testimony as to that conversation, then it is competent for you to bring out from the witness or in any way the whole conversation. If there is any conversation between this witness and Lieutenant Titus offered by the
157 Government you have the right to bring out the whole conversation.

Mr. Barker refers to answer to question "#22" of the standing interrogatories.

By the COURT: Now, I think it competent to bring out the whole of the conversation relating to the island being blockaded, that being part of the testimony.

Q. After he told you the whole island was blockaded, I understood that you put to him the question whether you could safely go to the westward?

A. Yes.

Q. What else did he say?

A. He told me when one of the U. S. ships spoke me or fired a gun to stop my engines and when the boarding officer came on board to show him all my papers, and also to show this endorsement he had put on the register, and he told me I would have no trouble in going along that north coast, where it was blockaded, unless I attempted to run in; that was as near as I can give his answer.

Q. After leaving the Badger what course did you take?

A. I proceeded on a westward course.

Q. Did you pass Caybarien?

A. I did.

Q. Did you see any blockading vessels at that port?

A. Not a ship in sight, when I passed, of any kind.

Q. Was there anything to prevent your going in?

A. As far as I could see, nothing. I don't know what was inside.

Q. Did you pass Sagua?

A. I did.

Q. Was any blockading vessel there?

158 A. I didn't see any ship off Sagua.

Q. Was there anything you could see to prevent your going into Sagua?

A. Nothing that I could see when I passed. I saw a ship to the westward, but some little distance.

Q. How far to the westward?

A. Appeared to be about 12 miles west of Sagua.

Q. What time of day or night did you pass Caybarien or Sagua?

A. I passed Caybarien about 5 o'clock in the morning—between 5 or 6.

Q. You have stated in your testimony *in preparatorio* that you had been told as part of the instructions from the owners of the cargo and the freighters of the vessel, Robinson & Co., that a tug would be waiting for you in Sagua or Caybarien.

A. A pilot.

Q. You knew there were people waiting to receive you in Caybarien or Sagua?

A. I expected from Robinson & Co.'s instructions there would be.

Q. Notwithstanding those instructions and that information, you passed those ports?

A. I did.

Q. And you say you saw, about 12 miles to the west of Sagua, a blockading vessel?

A. I — know whether a blockading vessel or not. I passed her in the night. She did not board me; she didn't have the usual lights, and I supposed she was a United States ship of war.

Q. Did you continue on that course?

A. I did.

Q. What next did you encounter?

A. The U. S. S. Hudson.

159 Q. Was that at night or day?

A. 11 o'clock on the morning of the 19th.

Q. Were you boarded?

A. I was and came alongside, and the mate came aboard and examined the papers.

Q. Make any memorandum?

A. None whatever.

Q. After leaving the Hudson did you encounter any other U. S. ships?

A. Yes; the next ship was the Tecumseh.

Q. You were still sailing west?

A. I was steering a west course when the Tecumseh boarded us.

Q. Generally westward?

A. Yes.

Q. According to the time on board your ship, at what hour were you spoken by the Tecumseh?

A. 6.10 p. m., July 19th.

Q. Have you a chart with you by which you recorded your positions?

A. Yes.

Q. I wish you would show the court the course you pursued with your vessel from Crooked Island channel to the point where you met the Tecumseh.

A. Very well.

Q. What chart is that?
A. A general chart of the West India islands.
Q. Issued by any authority?
A. The British Admiralty chart.
Q. Containing soundings and sailing directions?
A. The soundings are marked.

Q. Is that the recognized authoritative chart by which
160 other persons engaged in commerce in the Dominion of Canada or England go by?
A. Yes.
Q. Does that chart belong to the ship or you?
A. To me.
Q. I understand you that that chart is a memorandum kept by you from day to day of the progress of your voyage?
A. I invariably put the ship's position on that chart every day—on this chart when we were in these waters.
Q. It is a cotemporaneous memorandum made by yourself which you swear were the ship's positions made day by day?

By the DISTRICT ATTORNEY: I then object, as that ought to have been placed in the possession of the prize master and has no business to come in here now, and, if a private memorandum, it cannot be used now in behalf of the ship. If it is a ship's paper, it should have been in the possession of the prize commission; if private, he has no business here in court with it; we must go by the papers in the case.

By the COURT:

Q. Did you show this to Mr. Pratt?
A. I used it on board the ship. I had it; Mr. Pratt saw it; I did not know he wanted this.

If it is a fact that Mr. Pratt, prize master, saw this chart and used it, it is no imputation upon the ship that it was not given up. All the papers and documents on the ship were under Mr. Pratt's control. If he saw this chart and did not see fit to send it up with the other papers in the case, no inference one way or the other can be drawn from that. That is a different case from concealment. If there is anything on this chart that was not there when he
161 saw it, then it must be rejected as cotemporaneous memoranda.

Q. Will you show to the court and put your finger upon the course of the ship from the Crooked Island channel into the Bahama channel and the point where you met the Badger from the point where you met the Tecumseh?
A. The witness indicates on the chart the positions above indicated.

(The first chart produced was the one that he used up to a point opposite Sagua, and the second chart he used after passing Sagua.)

Q. From the data on those charts can you refresh your memory and give the number of miles traversed by the ship between Crooked

Island channel and the point where she was arrested, and from that ascertain the speed of the ship, the rate at which she was going?

A. At half past 11 the reading of the log was 10, at 6.10 the reading of the log was 42½, making 52½ miles sailed in six hours and 40 minutes.

Q. From that chart are you able to say what was the average rate of speed of your vessel?

A. The average rate of speed was from 7 to 8 knots.

Q. As you travelled through the Crooked Island channel and the Old Bahamas?

A. Going very nearly the entire passage, that was the rate of the ship—from 7 to 8 knots.

Q. At any one point between the Crooked Island channel and the point of your being captured by the Mayflower was there or not any material divergence from a straight course?

A. No.

Q. There was not?

A. No; I followed the line of the Cuban coast along, pro-
162 ceeding in a generally westerly course.

Q. You had the coast in sight on your port side?

A. Yes; in the day, on her port side.

Q. Any vessels of the blockading fleet were in what direction from you, generally? I am not speaking particularly.

A. The blockading squadron off Cardenas were hull down in shore when I passed Cardenas. I did not see any ships off Matanzas. I think we were too far off. I couldn't see any then. I saw a ship to the westward of the Tecumseh after I passed the Tecumseh hull down in shore again, and the ships were all in shore from me.

Q. They were, as you saw, all inshore?

A. Only one ship I saw off shore of me, the Badger, except a ship that signalled me when I was running along the coast, a ship running the same way I was. She overtook us and signalled.

Q. Was she a warship?

A. She hoisted the American ensign and I hoisted my ensign, and he sailed in the direction of Key West.

Q. From your recollection or from that memorandum, refreshing your memory from it, can you state the distance you were off shore at the time you met the Tecumseh or the distance you thought you were off shore?

A. I was 14 miles off shore, right off the nearest land, when the Tecumseh boarded me, sailing on a westward course then.

Q. After you met the Tecumseh, what course did you sail?

A. I steered west by north until 8 o'clock.

Q. One point north of west?

A. Yes.

Q. For how long did you follow that course?

A. About an hour and a half until 8 o'clock.

163 Q. That is, assuming you left the Tecumseh at half past 6?

A. That was the time the Tecumseh left us.

Q. From that time till 8 o'clock you steamed one point north of west?

A. Yes.

Q. At 8 or after 8, what course did you follow?

A. I kept the ship again on her course after 8 west.

Q. What made you put yourself on the course one point north of west after you met the Tecumseh?

A. The boarding officer of the Tecumseh advised me not to go any nearer the land. I told him I was steering a westerly course. He said, Don't go any nearer; if you do you may get a shell in you. I hauled the ship over west by north and went that course until 8 o'clock (8).

Q. What made you change your course, then, to west?

A. I thought I was far enough off shore. I considered I was way outside the blockading fleet.

Q. How stood you, *tehn*, to the Havana entrance?

A. At 8 o'clock Havana light bore about south by west.

Q. You were to the northeastward of Havana light at 8 o'clock?

A. About one point east of north.

Q. And you put the vessel back on the west course, which she had been pursuing before she met the Tecumseh?

A. Yes.

Q. You then after 8 o'clock followed that course due west until when?

A. Until the time we were seized by the Mayflower.

Q. On that course, did you pass the Havana entrance?

A. We did.

Q. How far, from your memory and from the memorandum you made at the time, can you swear you were from Havana
164 light when you passed it at 8.30? When I say swear I mean to allow, of course, for approximate estimates. I don't mean you t- swear to the minute or second or to the inch.

A. The position I have on my chart places the ship 17½ miles off Havana when we passed the light.

Q. Just at this point I remember a matter I had intended to ask you in regard to the clearances of this vessel. Captain Mackensie in his testimony stated it as a significant fact in this case that he found you with two sets of clearances, one for Vera Cruz and one for Kingston. Will you state, from your knowledge and experience as officer in the merchant service, what is the practise of vessels sailing from Cuban or British ports on the subject of clearances in that shape?

A. On this particular occasion I went to the custom-house officer to clear my ship——

Objected to witness going into this particular case. It is his experience as an officer.

Q. What is the usual practise in clearances?

A. I have been in one ship that had as much as 6 different clearances, and the last ship I was in invariably had 3. The last ship

was the Beta. I was in the ship 2 years, 9 months as chief officer and purser, and had charge of all the ship's papers.

Q. When you say more than one clearance, do you mean a clearance to more than one port or separate manifests and clearance papers given?

Q. Separate clearances and separate bills of lading for each port. That was the custom in the last ship I was in. It was a mail and passenger boat sailing out of Halifax.

Q. You have no other instance than in the Beta?

A. I have.

165 Q. Was there any war going on at the time?

A. No.

Q. You have known one ship to have had as many as 6?

A. I think we had about 6 in the Harlo, a mail and passenger ship, running from Halifax to ports in Newfoundland. At that time, which is about 2½ years ago, they used to have a separate clearance from every port they were going to.

Q. Did you give any particular instructions to the custom-house officer at Halifax with regard to the separate clearance papers?

A. I did not.

Q. Do you know of any one else having given such instructions to the custom-house officer?

A. I know of none.

Q. Where did you receive the clearance papers, and from whom?

A. In Halifax, from the custom-house officer; Mr. Fenerty was his name; he handed me the clearances and bills of health.

Q. And those clearances correspond with the terms indicated on the bills of lading?

A. I think so.

Q. Did you make any comment to the officer of the custom-house at the time? Did he hand you a separate manifest for Vera Cruz and a separate one for Kingston?

A. He did not.

Q. Did you regard it as singular?

A. No.

Q. Sis you take it as a matter of course?

A. I did.

Q. You have estimated in the testimony that the distance
166 from Havana light, at which you were captured, was 21 miles?

A. Yes.

Q. That is, you were north-northwest half west from Havana light, 21 miles?

A. Yes.

Q. How didyou estimate that to be the distance at which your ship was?

A. From the course I had been steering that should have been the position of my ship.

Q. You were sailing near 8 o'clock on a west course?

A. Just so; but I took the bearing of Havana light when it was dipping, just a little before 10 o'clock.

Q. Before the Mayflower fired her gun?
A. Yes.
Q. Or dropped her search-light?
A. Before.
Q. At that moment had you seen the Mayflower?
A. I had not up to that time.
Q. Had you seen any vessel in your wake?
A. No.
Q. Or on your port side?
A. No.
Q. Or starboard side?
A. No.
Q. At the time you made that observation it was before the Mayflower came up?
A. Yes.
Q. Just say how you made that observation and the calculation to satisfy yourself that it was 21 miles.
A. Havana light is a 21-mile light; it is visible 21 miles.
167 Q. By what authority?
A. The sailing directions for the West India islands, published by Norrie & Wilson, recognized all through England and the Dominion of Canada, as are all their diagrams and charts.
They say the light was erected on Morro castle. "On the east side of the entrance is a stone building 79 feet high with O'Donnell painted thereon. It shows a fixed light, varied by flashes every half minute, at 144 feet above the sea and visible 21 miles."
Q. Does it say anything of the elevation from which it is visible?
A. No; the usual elevation. The charts give the circle of illumination of all the lights. Their chart is made by the same authorities, Norrie & Wilson.
Q. I want you to say what that chart says with regard to Havana light, as to the elevation at which it is visible.
A. The circle of illumination on this chart has a radius of 21 miles; the circle of illumination gives the distance the light is visible.
Q. That is, the extreme distance?
A. Yes.
Q. How did you know it was the extreme distance? How did you judge of it being the extreme distance?
A. I took the bearings of the light when it was dipping, going out of sight.
Q. The last moment at which you would see it?
A. The last moment at which I would see it on the bridge.
Q. That is the highest point on the ship except from the masts?
A. Yes; 18 feet above the water level; that is the height of my eye when I am on the bridge.
Q. It was visible to you on the bridge further than it would
168 have been visible at 15 feet above the water level?
A. A little further.
Q. So you assume it was 21 miles off, a little before 10 o'clock?

A. I knew I was no nearer the light then 21 miles.
Q. What was the course at that time?
A. Steering the west course then.
Q. Having passed Havana?
A. Yes; the light bore then southeast by south half south 21 miles.
Q. Have you had the opportunity of reading over your testimony given *in preparatorio?*
A. I have.
Q. Are there any changes or additions or corrections that you would make to that testimony?
A. There is one place in it where I said I would have delivered my cargo in any port. I didn't mean by that that I would deliver it to any port in the world, but in any port in the waters of the four ports to which I was bound.
Q. What is the fastest rate of speed of which your ship is capable, everything being opened, all sails set, and a strong breeze?
A. Loaded, about 8½ knots.
Q. You consider that her utmost capacity?
A. Yes; that is about the fastest I have seen her go since I have been in her.
Q. Do you remember telling Lieut. Culver she had a capacity of nine knots?
A. I do not; I might have told him that.
Q. How could you have told him that if the utmost capacity was eight and one-half?
169 A. The ship could go faster when light than loaded.
Q. Faster with the current with her than against her?
A. Undoubtedly.
Q. If you told him that, would it or not have referred to the capacity of her engines to drive her without a load—if you told him that it would have referred to that?
A. To the highest rate of speed the ship was capable of. I don't know that the ship would go 9 knots.
Q. And you don't remember having told Lieut. Culver about 9 knots?
A. I don't remember; possibly I did.
Q. I only ask, if you did it, what you meant by it?
A. I don't remember if at all.
Q. What is your ordinary rate of speed? I don't mean on this particular voyage—the ordinary rate of speed on the ship?
A. It has been, since I have been on the ship, 7 to 8 knots.
Q. Then the average rate of speed at which you had been running before you met the Mayflower——
A. I had been running about 7½.
Q. From Crooked Island channel to the Mayflower?
A. No; I didn't make that much.
Q. Have you calculated the average you did make from your chart, locating her *per diem* course of the ship?
A. About 7⅓ knots average rate of speed maintained from Crooked Island channel until I met the Mayflower.

Q. If you were to push the ship to or above 8 knots an hour, what would be the natural effect?

A. She would consume a lot more coal. It would be hard on the machinery, and when the ship was loaded it would only be safe to do that in the very smoothest waters.

170 Q. Were you very flush of coal at that time?

A. No; the coal was getting short at that time.

Q. Before that time had you given any instructions to the engineer with regard to your rate of speed?

A. I had.

Q. What were they?

A. I told him to reduce the speed and save the coal.

Q. How is your calculation made to the run of the ship in point of miles every 24 hours?

A. Ordinarily get the distance from the log corrected by observations.

Q. What kind of observations?

A. Sun observations or star observations.

Q. If you were in sight of land could you correct it in that way?

A. Yes; correct it by land if in sight of the coast.

Q. Which of those ways of ascertaining the position and course of your ship did you use in making your record upon those charts?

A. I invariably used observations when I could get them—when the sun was not obscured. I would take the sight every morning at 8; I would take the meridian altitude at 12, and another chronometer sight about 4 in the afternoon, with occasionally a star or two at night.

Q. And land observations in the day?

A. When I was in sight of land I would take the bearing of the light-house or a well-known point of land to correct my position by.

Q. What kind of log is it which you take off the run of the ship by?

A. A patent log.

171 Q. What is that patent log and what does it contain?

A. It is an instrument for measuring the distance that the ship goes through the water.

Q. What has it inside of it?

A. Wheels something like the wheels of a clock.

Q. Has it anything which takes the impression from the water?

A. It is acted on by a fan—that is, at the stern of the vessel. As the fan revolves in the water the revolutions acting on this log are registered on the face of the log and the distance travelled.

Q. It has a dial?

A. Yes.

Q. How does it register?

A. The dial has a face like a clock, with three hands.

Q. Those hands are connected with the clock machinery inside?

A. Yes; one of the hands registers from a quarter of a mile up to a mile, the next hand registers up to 10 miles, while the third hand registers up to 100 miles—quarters, miles, and tens of miles.

Q. After it reaches 100 miles how do you get the registry from the log of the progress of the ship?

A. It goes back to one again; it starts back again at one.

Q. In taking down from the dial onto your chart or the ship's log the record made by the patent log you take down every revolution of the hand which records up to 100 miles; is that so?

A. I take just what is down on the log.

Q. You don't wait until it gets to 100 miles? How often do you take it off?

A. It depends on circumstances; 4 hours sometimes, 2 sometimes, and sometimes oftener. At sea I only take it 24 hours, as a rule, but the mate takes it every 4 hours.

172 Q. As a rule at sea, then, you don't run but 24 miles?

A. Oh, yes.

Q. I want to get exactly at how you distinguish between when one 100 is exhausted and the next 100 started.

A. You can always tell very nearly what the ship is going through the water, and it is not possible for a seafaring man to make a mistake of 100 miles in the speed.

Q. How did you get on the chart the figures you took from that log? Show the judge how you took them. On this chart I find 106 miles. I want to know from what that dates. If the dial only registers 100 miles, how did you put down 106 and know it is 106?

A. The last record on the log is 87, and when it was logged again it was found 6 miles—that is, it had passed the 100; take the difference between 87 miles and 100, it was passed the 100 and was on the 6 miles.

Q. On the next revolution?

A. Yes.

Q. Every 100 miles is a new starting point?

A. Yes; after it reaches 100 we go back again to one.

Q. From that record of the number of miles travelled by the ship how are you able to estimate between any two points on the chart the rate of the speed of the ship?

A. By dividing the distance travelled or sailed by the number of hours consumed.

Q. And that calculation, you say, is subject to correction by observation of the sun, stars, or the land?

A. Yes.

Q. Did you or not increase your speed between the time you met the Tecumseh and the time you were stopped by the Mayflower?

173 A. No.

Q. What speed was that from your calculations subsequently made?

A. It was 7 knots—nearly 7 knots—calculating the time we were stopped by the Tecumseh. We were stopped by the Tecumseh 20 minutes, which would give her a speed of a little over 7½ knots, on an average.

Q. What time, according to your calculation, was it you left the Tecumseh?

A. 6.30.

Q. From that time until 10 o'clock, running first one point north of west until 8 o'clock and then west from 8 o'clock to 10, how many miles were travelled by you?

A. 27½.

Q. What rate of speed does that show?

A. I have not figured that out exactly; about 7¾ knots an hour.

Q. Could you have traversed that distance at the rate of speed you were sure you were going before and after you met the Tecumseh? Could you have travelled that 27½ miles if you had diverged from a straight course?

A. The fact is I did diverge from a straight course. I steered west by north first.

Q. If you had diverged from two straight courses, one north by west and the other due west, between the point you left the Tecumseh and the point where you were arrested, could you have done it, in the speed of your vessel, in any other than straight lines?

A. A line is not absolutely a straight line. I couldn't have done it if steering all over the ocean.

Q. If dodging about or loitering or running away from the pursuer?

A. The ship could not have been in that position; not if
174 she had been dodging about, as you say.

Q. Is there anybody on board beside yourself who keeps the register of the speed of the vessel—not the time she was making in the water—I mean the speed of the engines?

A. The chief engineer keeps the speed of the engines.

Q. How does he keep it?

A. I don't know just how he keeps it. He takes the number of evolutions the engines are making. I don't know very much about that department.

Q. Were your lamps lit that night?

A. They were.

Q. And the night before?

A. They were.

Q. You will swear to that positively?

A. I will.

Q. The lights required by the Government regulations—that is, a light forward on the mast——

A. Masthead light and the two side lights.

Q. Is there any difference between the strength of one and the other?

A. The masthead light is visible at a distance of 5 miles; the side lights, two miles.

Q. Was there any other light on that ship that could have been seen nearer than 5 or 2 miles?

A. At the time of capture, do you mean?

Q. Before the time of capture?

A. The other lights burning on the ship that night—there was a light in my chart-room.

Q. Is that what Lieut. Culver calls your office?

175 A. No.

Q. Different from your office?

A. Yes.

Q. Is the chart-room above deck?

A. The chart-room is on deck, underneath the bridge, and has two doors, a door on each side, and a desk in there and a lamp; the lamp was lit about dark; I don't know the time it was lit; just an ordinary hanging lamp.

Q. Is it hanging up?

A. It stands in a bracket on the side; then there was another light in the after-house that was burning, the light in the lantern hanging from a hook and I don't know whether any other lights were lit on the ship; those are the only lights that I know of.

Q. Distinguish between your chart-room and the other place which you say there was a light hanging.

A. I presume Lieut. Culver, when he said my office, meant the after cabin, which is under deck.

Q. Under the deck?

A. Yes.

Q. Is that light in that visible outside?

A. No; it would not be visible unless the door of my room was open; then it would be from the ports in my room.

Q. One or two doors in your room?

A. One.

Q. Any steps leading down?

A. The steps leading down from the deck to the after cabin; my room is off the after cabin.

Q. You say two doors to that room?

A. Two doors to the house on deck.

176 Q. If they were open at a certain angle, a lantern that hung there would be visible outside?

A. The light that hangs in there, that house, would be visible between the bearing 4½ points and 5 abaft the beam and only between those bearings on each side.

Q. That would be only half a point?

A. Three-quarters of a point.

Q. It would be visible through the door on the port and starboard side at those bearings?

A. Yes; between those bearings.

Q. State your conversation with Capt. Mackensie and your recollection of it when you were arrested.

A. When I went on board the Mayflower, after being introduced to Capt. Mackensie, he told me that he was going to send me in. I asked for—he invited me down in his cabin, and he told me that I had been changing my course. I told him I had not changed my course since 8 o'clock. He said, A very strange thing; he couldn't account for it if I was not changing my course. He then asked the speed of the ship, and I told him 8 knots, when he said, I don't be-

lieve you, because we have been chasing you now for nearly two hours, and my ship was going all the way from 11 to 16 knots, and he says, It was not possible unless you are making more than 8 knots. I told him he couldn't have been steering a straight course if he had been chasing us that time at that speed. He said it was very hard for him to believe; he should say the ship was nearer 18 than 8. I told him it was simply an impossibility. I forget all the conversation we had. He asked some one present there what they had about the Newfoundland, and a letter was brought, and he said to me, I have here information given by or through the
177 United States consul at Halifax that you left Halifax to run the blockade. Now, he says, if it was not for that I would let you go, but I will have to send you in. It is better for me to err on the right instead of the wrong. If the United States Government makes a mistake they will have to put up with the consequences; I cannot afford it, and I will have to send you in. I said, If I was in your position I would do the same thing; I can't blame you for sending the ship in. That is as near as I can recollect the conversation.

Q. What did you know of the Cuban blockade before you left Halifax?

A. I asked Musgrave & Co. to give me a list of the blockaded ports in Cuba. He said he would. When I went for my papers he handed me a map and told me the lines on the map represented the ports which the Cuban government had notice was blockaded. He also told me, which I very well knew, that Guantanamo and Santiago were blockaded, although no such notice had been given to the government of such blockade. I gave the map to the prize commissioners.

Q. Is this the map?

A. Yes.

Q. Was Caybarien one of the ports marked as blockaded on this map?

A. No.

Q. Sagua la Grande?

A. No.

Q. Havana?

A. Yes; Havana was blockaded.

Q. I suppose it is *l*igitimate for me to ask the question, as we are on the question of intention, if you had been allowed the choice of selecting a port for running the blockade in Cuba, from your knowledge of the condition of things there, would you have selected
178 Havana?

A. No; I think Havana is about the last place I would have selected to run, if I had been intending to run the blockade.

Q. When Capt. Mackensie captured you, then you were heading for Havana?

A. No; I was heading at the time the gun fired—I was heading west.

Q. For or away from Havana?

A. Away from Havana. Although not directly away, I had

passed, and this course was carrying me further from Havana and further from the coast of Cuba.

Q. What is your recollection of the time of sunset on the evening of July 19th?

A. On the 19th the sun set 6 hours and 37 minutes at Havana.

Q. After the sun set, how long was it before dark?

A. Not more than 30 or 40 minutes; half an hour or 40 minutes. Twilight was very short down there.

Q. If there is any point I have failed to ask you and upon which you desire to give your testimony, I beg you will now speak out, as the examination in reply is only what the cross-examination brings out.

A. I don't know of anything.

Cross-examination by the DISTRICT ATTORNEY:

Q. Of what country are you a native?

A. Nova Scotia.

Q. How long have you been engaged in the service at sea?

A. 18 years.

Q. And in what capacity have you been serving during that time, and where?

A. I have been serving in almost every capacity you can
179 mention—from before the mast, or boy on board the ship, up to master, and I have been nearly all over the world.

Q. Are you or not well acquainted with the West Indian waters?

A. Parts of the West Indian waters I am very well acquainted with.

Q. What parts?

A. Through the Windward passage and around the island of Jamaica and along the coast of Hayti.

Q. How about the coast of Cuba?

A. I have been to Guantanamo once and Cardenas once and Havana once, and those are the only three voyages I have made to the island of Cuba.

Q. How long have you been sailing as master on a ship?

A. I think about 6 years; I don't remember exactly.

Q. And as such have you been engaged in foreign trade—that is, trade between ports foreign to each other?

A. As master, until this previous voyage, I have been trading between Canada and Great Britain.

Q. Then you have never made but one trip to any other than a British possession, as master?

A. Yes; I have. I was master of a barkentine out on a voyage to the River Platte.

Q. You said, on the ships that you sailed on it was customary to have separate clearances for the different ports to which they had good- consigned?

A. Yes.

Q. Was it customary on any of those ships where there were goods consigned and clearances to have verbal instructions to enter

and discharge a cargo at any port other than those mentioned in the manifest and clearances?

180 A. The ships I had reference to were both mail boats. Both received subsidies from the Canadian government, and they had to go to certain ports; they had contracted with the government and had to fulfil that contract. They could not go to outside ports.

Q. Don't you know, as a matter of fact, as a seafaring man, that it is necessary for you to have written authority, when you enter a foreign port, to show your right to enter and discharge cargo, from the owners of it?

A. No; I don't know that to be the case.

Q. Then you would say it was safe for you as master, with clearances from one country—with manifests and bills of lading to that port—it would be safe for you as master to go into the ports of another country to which you had no clearances and offer that cargo for sale?

A. I did not say to offer it for sale. I said it would be safe to go in if it was the instructions of my owners to do so. That was the meaning I intended to convey.

Q. You never before in your experience had instructions to go and deliver cargo at any other port than those for which you had clearances?

A. No; I never did.

Q. This was the first time?

A. Yes.

Q. You knew that there was a war going on at the time you left Halifax between Spain and the United States?

A. I did.

Q. You knew there was a blockading force in the Cuban waters?

A. I did.

Q. And when you were boarded by these U. S. ships you

181 were asked where you were going?

A. I was.

Q. Did you tell them your real destination was a Cuban port?

A. I did not.

Q. What was your object in deceiving these officers from the U. S. vessels?

A. I didn't do it with intention to deceive; under the circumstances, my destination was not a Cuban port.

Q. But you have sworn positively the real destination was a Cuban port.

A. If those ports were open.

Q. And your information was they were not.

A. My information was from Lieut. Titus, of the Badger, that the whole island of Cuba was blockaded, as I have stated.

Q. When he asked you your destination, you hadn't then—when her officers came aboard you had not then received any information that the whole island was blockaded?

A. I am not positive.

Q. Was not that the first time?

A. I am not positive whether he told me before or after he had examined the ship's papers.

Q. I mean before you met him, had you any information to that effect?

A. None whatever.

Q. You didn't give him any information as to the real destination of the vessel on leaving Halifax?

A. I did not.

Q. And now, as I understand, your instructions, which you felt bound to obey, were to go to Sagua or Caybarien and enter
182 those ports, if not blockaded; if blockaded, to go to Kingston, Jamaica, and there telegraph to the owners for instructions.

A. Those were my instructions; I was at liberty to go to Vera Cruz as well.

Q. You didn't say anything about the liberty of going there in the direct examination; you said to go to these ports, if not blockaded, or, if blockaded, to go to Kingston and telegraph.

A. Those were my instructions, and when I got to Kingston I was to cable for instructions.

Q. Why didn't you obey those instructions?

A. I did, as far as my judgment goes.

Q. Was it your judgment—you were told of this off Neuvitas, that you couldn't make either of these ports that you were bound for. Is it not several hundred miles nearer to Kingston around Cape Maysi from the point of Neuvitas than it is to go around, the way you were heading?

A. It is undoubtedly; but I was going, when I met the Badger, on the west course. If after the Badger left me I had turned round and gone in an easterly course I considered I would be submitting myself to unnecessary suspicion.

Q. Otherwise it would expose your secret instructions to the officers of the Badger?

A. No; I didn't say that, and I don't mean that; I meant what I said. To meet a war ship going on a course and after meeting it to turn round and take another would be a matter of suspicion.

Q. Would it have been a matter of suspicion to tell the instructions when you found out about those ports and to turn round?

A. I don't know. A person placed in the position I was perhaps does not always do what he would do afterwards. I had
183 another reason; I wished to pass those ports; although I felt they were blockaded, I wished to satisfy the owners. There is a clause in the charter which says the master is liable to be dismissed by the charterers if he does not satisfy the charterers. I wanted to satisfy my charterers that those ports were blockaded.

Q. You never did tell any of these officers who boarded you that you had any other destination than that mentioned in the ship's papers?

A. I did not, for after I passed the Badger I had no other destination except what was mentioned in the ship's papers. I considered that my instructions were cancelled in regard to those ports

when the Badger told me they were blockaded, and I acted accordingly.

Q. Then you desire to change what you said a few minutes ago, that you wanted further evidence than what they gave and you went on past those ports to see?

A. I said I wanted to satisfy my charterers, although I was perfectly satisfied in my own mind, but by passing those ports on the log that would be evidence to satisfy them; I didn't want further evidence for myself.

Q. After you had passed the port of Sagua was it not 240 miles nearer to Kingston to go back than to continue on a west course?

A. Yes; about 200 miles shorter.

Q. And you were getting short of coal?

A. I had plenty of coal to get to Kingston. I didn't have enough to go to Vera Cruz and then Kingston.

Q. You were going to Kingston; that was your destination—where you were instructed to go?

A. From the way things turned out, Kingston was my real destination; had I turned around after I passed Sagua I would
184 have been as bad in that shape as before; I would have had to go east.

Q. As a matter of fact, would you have been injured in any way except that you would have to tell the commander of the boat your real intentions, what they had been from the start?

A. I don't know; probably if I had told them my cargo was destined for Cuba, no doubt they would have seized the ship.

Q. And it was for that reason that that fact was concealed?

A. To avoid suspicion, as I have already stated.

Q. That, you understood, was the reason that actuated the charterers and owners in their instructions to you at Halifax?

A. I don't know anything about those people at all. I received the instructions and did the best I could to carry them out.

Q. You have been a seafaring man and the commander of a vessel for the past 6 years, thought this was a first starting out on such a voyage as that, with papers to one port and verbal instructions to another?

A. Yes; I have already said so.

Q. Didn't that strike you as being rather an extraordinary voyage you were expected to make?

A. I can't say that it did. I didn't consider anything extraordinary about it. I just looked on it as though if I got to Cuba, if the ports were open, I was to go in, and if not, I was not. I didn't think anything extraordinary about it at all.

Q. You thought you were going on rather a risky voyage?

A. No; I didn't consider I was running any risk at all.

Q. Or your vessel?

A. I did not.

Q. You knew the charter-party recorded rather an extraordinary position there in regard to insurance?

185 A. I don't know about extraordinary. What do you mean by that?

Q. In certain limits the written class required the charterers to insure her for full value against seizure. Did you ever sail under a vessel having a charter-party like that before?

A. No; I never sailed in charge of a vessel in waters where two nations were at war. I didn't consider anything unusual, considering Spain and the United States were at war.

Q. You knew they did not interfere with legitimate vessels who were in trade?

A. In fact, I believe now to the contrary. My ship is a neutral ship and was seized by the Mayflower, and she was engaged in a neutral trade as well.

Q. You say these instructions were given to you or read to you—a letter from Robinson & Co. to Capt. Farquhar?

A. The Captain handed me the letter and I read it.

Q. Was it a letter written to Capt. Farquhar, addressed to him?

A. I think it was. It was not addressed to me; I know that. I think, as Captain Farquhar had charge of the ship on the previous voyage—I think probably he received the letter before I joined the ship. I know the letter didn't come to me and it was not addressed to me.

Q. And you don't know what has become of that letter?

A. I don't know.

Q. You say that you saw this ship, the Hudson, before they signalled you, I believe?

A. I saw the Badger, Hudson, and the Tecumseh long before they signalled me.

Q. Which was the first vessel that boarded you at night?

A. The Badger.

Q. You saw her, you say, before she threw the flash-light on you?

186 A. I did.

Q. And in what position was she to you when you first saw her—how did she bear?

A. About a point and a half on the starboard bow when I first saw her.

Q. Is that nearly abeam?

A. No; quite near the bow.

Q. Then your running lights were plainly visible to her at that time?

A. Yes; they should have been—yes; our lights were visible to her when I first saw her.

Q. The running lights, as I understand, only show after they get forward two points abaft the beam?

A. From right ahead to two points abaft the beam on each side.

Q. Now, what sort of lights—you say you had the ordinary lights—such as ships of that character carry?

A. Yes; lights approved by the board of trade.

Q. And by the law of the country where you sailed from they are required to show side lights, at least two, and masthead lights at least five miles at sea?

A. Yes.

Q. Now, as a matter of fact, the lights you had there would show until they dipped below the horizon of the sea?

A. No; they wouldn't.

Q. How far would they show?

A. I am not sure that they would show, the masthead further than 5 and the side lights 2.

187 Q. A side light, wouldn't it be at two miles, on an ordinary ship and the masthead at 10?

A. It would not; it dips at 10 miles.

Q. Not from the deck of an ordinary ship. How high above the water is your masthead light?

A. I don't know; I never measured it, but I dare say I can give an idea. The light-ship, as I understand, is seven miles from Charleston. Standing on the bridge of the Newfoundland at high water, I can see the hull of the light-ship. That will give you an idea as to the distance.

Q. You said when you passed the port of Havana you saw a vessel inshore of you?

A. Before I passed; not at the time; it was dark when I passed.

Q. After you had left the Tecumseh?

A. Yes.

Q. You saw the ship inshore of you?

A. Yes; she was hulled down inshore of me. It was just dark. She was steering to the northeastward. I don't know what ship it was. She had two masts.

Q. How far did you make her out to be from you?

A. I judged the ship was 8 miles inshore of us at that time; possibly more, but at least 8 miles.

Q. When you were boarded by these various ships—by officers from them—did you show to any of them this charter-party you were sailing under?

A. No; I did not; I didn't consider it was necessary; none of them asked for it. I did not consider it as one, and do not yet, as one of the ship's papers, except for my own guidance. It was a copy given me for my own guidance. It is not a paper like

188 a clearance or manifest or bill of lading. It is not an official paper in any respect.

Q. You say when you passed Sagua and Caybarien that you saw no evidence as to either one of them being blockaded?

A. I did not in passing either of those ports. I never saw a ship.

Q. As your instructions were to enter them if they were not blockaded, why didn't you enter the ports if when you passed them you found they were not blockaded?

A. I didn't say I found they were not blockaded. I said I accepted the statement of the officer of the Badger in regard to the ports being blockaded. I did not see any of the blockading squadron. I had no intention of going into those ports when I passed them. I had abandoned all intention of going to either of those ports.

Q. You produced two charts that you referred to. Did you have both those charts on your chart-board when you were captured?

A. No; not when I was captured. I had this chart, which is a chart of the island of Cuba, on the desk.

Q. That is the one on the desk?

A. Yes; but when the prize master came on board, as we could not shape the course from this chart, I took a general chart of the West Indies and we used it as far as we went.

Q. He saw this small chart of the island of Cuba? He looked at it?

A. I don't know that he looked at it. He slept in the chart-room, and all the charts were in the chart-room. I never moved them out.

Q. When he went aboard were those charts in the same position as to marks as they are now?

A. No.

Q. In what respect are they changed since?

A. The chart of Cuba, the lines have been drawn connect-
189 ing the position and also the lines bearing from Havana light. I have drawn those since.

Q. Were those points, all of them, on the chart at the time when he went on board?

A. I am not sure about all of them; there are some points here not on the chart that I have put on since; they have reference to the position.

Q. You say you put them on. They were put on?

A. I put them on—all the marks on that chart, I believe, I put on; there is one on the other chart the mate put on; taking the bearing of the light-house, he was posting her; I was asleep; but only one on that chart. I put them all on.

Q. How long before you were captured did you say you had taken your bearings from Morro light?

A. I should say about 5 minutes after I put the ship's position on the chart, for I had just come out of the chart-room when the second mate, on watch, told me there was a light astern. I saw it was a search-light; went on the bridge, rang stand by, and not two minutes after the Mayflower fired the gun. I rang stop, and the engine stopped, and it was not more than 5 minutes from the time I put the ship's position on the chart until the Mayflower fired the gun.

Q. And Havana light was then dipping?

A. It had dipped then, when I went on the bridge. When I was waiting for the Mayflower I had to stand on the seat of the bridge to see it. I could not see it from the bridge; it had passed beyond the circle of illumination.

Q. Did you navigate the Newfoundland from the point of seizure to Charleston?

190 A. I did.

Q. Did you make a good passage and a good landfall at Charleston?

A. I did.

Q. Did you make any notes on your chart from the point of seizure to Charleston?

A. I did; that is marked on this chart of the West Indies, as far north as it goes; the positions are marked there from time to time.

Q. During your passage did you have a memorandum book or note book upon which you took the readings before you put them down?

A. I used the same blank book I always use, the blank book for figuring in.

Q. Tell us from what point you took your departure to make the port of Charleston.

A. We had a dispute about that. Mr. Pratt said we were 17 miles out; I said 21; so we agreed between the two to split the difference.

Q. And in splitting the difference it brought you right?

A. No; it did not. I found the next day that the ship was about 20 miles from where she should have been.

Q. 20 miles in what direction?

A. Eastward.

Q. Did you make any calculations in your sailing? I don't know the terms for the current. How many hours were you making the run from the point of seizure to Charleston?

A. I think about 61 hours.

Q. And how many miles do you call it?

A. About 600 miles.

Q. That is the rate of 10 miles an hour?

A. Very nearly.

191 Q. Did you make any better time on that trip than the ship had been making on the outward voyage?

A. The ship didn't go any faster. She had all the way from one to four knots current with her; on an average of 1½ to 2 knots current from the time of leaving Havana to Charleston. We came up in the strongest part of the Gulf stream.

Q. Do you mean to be understood to say that the average current from the point of seizure to Charleston is 2 knots?

A. That is the average as we experienced it.

Q. Referring to the conversation with Capt. Mackensie, didn't he say to you he would not have sent you in unless he believed you were trying to run the blockade of Havana, and if he was mistaken you must seek redress from the United States?

A. I don't know that Capt. Mackensie told me that; I don't know about the language.

Q. That is the substance?

A. Capt. Mackensie told me if it was not from information contained from what he had in his hand he would not send me in; he would let me go if it was not for that, holding whatever it was in his hand. I would let you go. He might have said that. If Capt. Mackensie said he said it, I don't doubt his word.

Q. Did you take as your departure from the point of seizure for Charleston Morro light south-southeast 18 miles?

A. Yes; south-southeast half east 18 miles is the departure we took.

In Reply.

Q. Did you suggest or calculate or make that position, or did you accept it from somebody else?

A. I was in a position where I had to except it.

192 Q. Who gave it to you?

A. The prize master in charge of the ship.

Q. That is his work, not yours?

A. It is mine as well as his.

Q. Did you accept it without making any separate calculation of your own?

A. I did; I did not make any separate calculation.

Q. Who made the calculation?

A. Mr. Pratt and I.

Q. Between the time of capture and point of departure, how long a time was that?

A. Nearly 3 hours.

Q. Who told you the current there was a knot an hour?

A. I think the boarding officer from the Tecumseh.

Q. At 3 hours, at the rate of a mile an hour, it would put you to the eastward three miles?

A. If the current was running that fast and in that direction, it would have put us that.

Q. Those points which have been placed on the chart since your capture, what were they taken from? You said some of those positions of your ship noted on the chart had not been there before.

A. All the positions of the ship that are on that chart of Cuba were noted at the time of the capture; there are other lines I have drawn since.

Q. The positions were previous to the capture?

A. Yes.

Q. And the last position, 5 minutes before, was put down by you on that chart at that time?

A. It was.

193 By the COURT:

Q. I understand you had instructions from your owners to deliver that cargo at Sagua or Caybarien; at Caybarien a pilot was to meet you; that you were notified before leaving Halifax that those ports were not blockaded (as a matter of fact they were not blockaded; no official notification at that time or since), and the Government can hold that you were within your right entirely as a neutral in taking your cargo into Sagua. It appears from your testimony today, starting out with an intention of going to Sagua, you passed that port so near that you saw it was not blockaded. Why did you not enter it, if that was your intention?

A. The reason I didn't enter or try to enter was I was told they were blockaded. That is my reason.

Q. You saw that they were not blockaded?

A. No; I didn't see that they were not blockaded at the time. I didn't see any ships off Caybarien or Sagua.

Q. Don't you know that it requires ships to enforce a blockade?

A. I don't think any ships were at Caybarien. I don't know about Sagua; it was in the night when I passed Sagua.

Q. If you can give any explanation, I would like to have it.

A. That is the only explanation.

Q. The ship is charged with a grave offense and subject to forfeiture, and if there is any explanation further than that you have given—we must say the circumstances look very suspicious.

By Mr. BARKER: I asked this witness if he did not say after he was told by Lieut. Titus, of the Badger, that the ports of Caybarien and Sagua, to which he was bound under his instructions, were, with all the rest of the ports of Cuba, blockaded; if he had
194 not then abandoned his intention of going into Sagua or Caybarien. I also asked him if he did not say in his examination that, notwithstanding his having abandoned that intention, he determined it was proper for him, in view of the charterers of the charty party and owners, that he should pass those ports for the purpose of saying that he had passed the ports and seen they were blockaded. Therefore for that reason he was on a westerly course, and with the additional reason he felt at that time if he turned back he would expose himself to needless suspicion. Those are the reasons he gave for having pursued his westerly course and not having gone into Sagua or Caybarien; that he was informed from officers of the United States, and, although he saw no blockading vessels there, he did not go in, and, although he had determined at that time not to go in, he nevertheless, in order to be able to report to his instructors and owners of the cargo, he felt it incumbent upon him to go past those ports.

By the COURT: The court will inform the counsel why he asked that question. It is this: There are some circumstances connected with the conduct of the ship on the night of the capture tending to show an intention to enter the port of Havana. As to the weight of those suspicions, the court has not reached any conclusion, but there are some circumstances tending to show that intention. Everything that goes to show why this ship was off Havana at that time, every circumstance tending to account for his presence there, is pertinent to that inquiry. Now, he has not explained to the satisfaction of the court as yet—to its full satisfaction—why he was passing Havana that night, why he was passing there at all, why he was about the port of Havana that night. If the testi-
195 mony of the Government is to be believed at all, that he passed the Tecumseh at the time stated, there is an interval of time to be accounted for. The case for the Government is that during that interval of time he was lurking about to see if he could enter Havana. If he honestly intended when he sailed to enter the port of Sagua, which he could lawfully have done, that would rebut the idea that he started for the port of Havana; but if he had no intention at any time to enter the port of Sagua, then the court

might believe that his secret instructions when he left Halifax were not to go to Sagua, but Havana. If those were his secret instructions, any lurking about that port, any delay upon his voyage westward, would indicate he was waiting for an opportunity to enter the port of Havana. That is in the mind of the court and requires explanation.

By Mr. BARKER: We have nothing to offer beyond what has been stated as to his reason for not going into Sagua or Caybarien, but that he accepted the statement of Mr. Titus that those ports were blockaded. We have nothing to offer as to his going past those ports except that which has been testified to. He felt, notwithstanding the information of the United States officer, it was incumbent on him to satisfy his principals; that he should pass those ports and see for himself and be able to report that he had gone by. Having got to those ports, he then pursued his westerly course for the reasons he has given in his testimony, because he did not feel that it would be right for him to expose himself to unnecessary suspicion by reversing his course and going back upon it. It was safest for him, being exposed to arrest, to go on a west course and not expose himself to unnecessary suspicion; therefore he pursued his course, after passing Sagua and Caybarien, going west.

196 Those are all we have to say, as I understand Captain Malcolm. If he has anything else to say to the court, I beg that he be allowed to say it.

By the COURT: That is not an explanation that satisfactorily explains. Having reached that point off Neuvitas when, according to his statement, he was on his way to a port where he was free to go, having reached that point and being informed to his own satisfaction that he could not reach the port where it was l-wful for him to go, then why did he go around the whole island of Cuba in order to reach Kingston, when he could have gone around Cape Maysi, if that was his real destination? I cannot understand it. The explanation he gives does not satisfy me, and it tends therefore to give color to the suspicion that he was loitering around Havana for the purpose of entering.

By Mr. BARKER: He stated that he felt under obligations to his principals to go past those ports, so as to be able to report that he passed them. That is all I can offer.

By the COURT: Would he not have laid himself open to a graver suspicion, assuming that his destination was Kingston, if he had pursued the westerly course around the whole island of Cuba?

By Mr. BARKER: If the sole purpose of his life was to avoid suspicion, it was.

Q. Can you give any other or better explanation of your reason for not turning back after meeting the Badger and pursuing your westerly course?

A. No; I have no other explanation than I have already stated. I said I wanted to satisfy the minds of the charterers, as my

197 position is in a measure dependent on them, according to the terms of the charter-party. I was told that Sagua and Caybarien were blockaded, and I accepted that as if the notice was

from the Government. I accepted it and never questioned it, as far as I myself was concerned.

198 *Captain Malcolm Continued.*

CHARLESTON, *September* 2, 1898.

Captain MALCOLM recalled.

By Mr. BARKER:

Q. What is the number of your crew?
A. 22.
Q. What is the number of the watch?
A. 8, or 9 when I am on deck myself.
Q. 9 when you are on deck?
A. That includes the engineer department and the deck department.
Q. Was the mate on deck the night the gun was fired?
A. Not when the gun was fired?
Q. Was he there afterwards?
A. He was. I sent for him to get his log book for the boarding officer.
Q. He was there when the boarding officer came up to the ship?
A. Yes; he was on deck when the boarding officer came on board.
Q. Were any of the engineer's men on board at that time?
A. I don't know. I did not take notice.
Q. One other question. Did you have any other instructions whatever than those you have testified to here?
A. I had no other instructions than what I have already sworn to, from any one.

Cross examination by the DISTRICT ATTORNEY:

Q. In regard to these instructions, did you expect when you arrived at either of these ports—Caybarien or Sagua—to find there original bills of lading awaiting you?
A. I expected to find an order from Robinson & Co., the shippers of the cargo.
199 Q. That they would have parties there; would have the original bills of lading sent on?
A. I don't know about that. My instructions were, in that respect, to deliver the cargo to the order of the shippers, Robinson & Co., Montreal; that is what I expected to find.
Q. You expected to find a pilot watching out for you, and lighters ready to unload the cargo?
A. I did, from those instructions.
Q. And that your instructions were to unload as quickly as possible, working day and night if necessary?
A. Yes.
Q. I see one of these bills of lading is endorsed in blank David Robinson & Co.; the others appeared to have been endorsed and the endorsements erased with blue pencil.
Q. I think I can account for that. I got the bills of lading at the

office of Musgrave & Co., and I signed them all together, and Musgrave & Co.'s clerk gave me two bills of lading; those are the two that he gave me; probably it was intended to give me the two that were marked out. I don't know as to their intention; I only know those were the ones I got. That may have been the way I got the bills of lading that were not intended to be given to me.

Q. Do you know anything about the railroad connections from the ports of Caybarien and Sagua?

A. I don't know anything about the railroad connections in Cuba whatever.

Q. In your charts there that you have, are you acquainted with the lines on them, the lines that represent the railroads on the land?

A. I have never examined the charts in that respect. I
200 know as a rule railroads are generally marked on the charts.

Q. Did you notice on the charts those black lines?

A. I see the railroads are marked here on the chart.

Q. Look at that; are there any railroads marked running into Sagua and Caybarien?

A. Yes; to both places.

Q. And do those railroads connect there with the railroad system running to Havana?

A. They do.

In Reply.

Q. You say you see them on the map now?

A. I do.

Q. Did you ever take notice of them before, particularly?

A. I have probably noticed them before, but paid no particular attention to them.

Q. You were not running a railroad?

A. No.

Q. How long have you had those charts?

A. Both these charts I bought in Halifax in July.

Q. You spoke of them as your private property?

A. I bought the charts and paid for them out of my own money. It is customary in that class of ships for the master to find all the charts, and also all the instruments of navigation.

Q. On your previous vessels have you been in the custom of finding the charts?

A. In the last ship she found her own charts; she was a different class of ship from this.

201 Q. How many bills of lading did you sign in Musgrave's office?

A. Six.

Q. And of those how many were given to you?

A. Two.

Testimony of Albert Salkus on Final Hearing.

ALBERT SALKUS sworn.

By Mr. BARKER:

Q. What is your position?
A. Chief mate—first officer of the Newfoundland.
Q. How long have you held that position?
A. 3 years on the Newfoundland.
Q. How long have you been on that ship before?
A. I was in that ship when the Allens had her—since 1875—before any talk of Capt. Farquhar.
Q. Did you keep the log from Havana to Charleston?
A. Yes.
Q. Is that the log as you kept it (indicating)?
A. Yes.
Q. When were those entries made?
A. As they happened—every 4 hours; every 4 hours I went below.
Q. According to that log, how many miles apparently had the ship gone from off Havana to when you sighted Charleston light?
A. 476 miles.
Q. The real distance is how much?
A. 600.
Q. That shows what?
A. A strong current in the Gulf stream; 124 miles of current setting with the ship I have to account for.
202 Q. How many days?
A. 61 hours. We started from there at 12.45, when we left, and we hauled the log in at 2 p. m., at the light-ship.
Q. How many miles does the log show?
A. 476 miles.
Q. Reckoning on the speed of the ship as 8 knots and allowing 2 knots for current, what would that make the actual speed?
A. The actual speed, 610 miles.
Q. I want the speed; how much an hour?
A. Barely 8 miles.
Q. Did you keep the log of the ship from Halifax to the point where you were captured, off Havana?
A. Yes.
Q. In that log you have stated that in passing Havana entrance you were 10 miles off shore.
A. Yes.
Q. How did you arrive at 10 miles?
A. We didn't get no 4-point bearings of the light before; we didn't see the light until a point before the beam; too far off. I just took a rough calculation and gave the ship the benefit of the doubt. We didn't have no correct bearings, and it is safer to give the ship the benefit of the doubt.
Q. You made no calculation?
A. No; guessed at it in going below?

Q. And you put it down, giving the ship the benefit of the doubt?

A. Yes; we didn't take any correct bearings.

Q. Why did you think it was more than 10 miles off?

203 A. By the distance the light showed. When I saw the light it was a point before the beam, bearing west by south.

Q. What course were you running that time?

A. West.

Q. Had you varied the course on that watch?

A. From 6 to 8 we did. At 8 o'clock we steered west. We had been steering west by north before that.

Q. What was the course of the ship when you met the Tecumseh?

A. West, I think.

Q. You met her to the eastward of Havana light?

A. Yes.

Q. What time of evening on the 19th did you meet the Tecumseh?

A. 10 minutes after 6 we were stopped and the Tecumseh came alongside of us.

Q. How did you arrive at that time?

A. I was on deck; my watch was on deck from 6 to 8, and the watch had been relieved 10 minutes before that.

Q. Was that the time?

A. That she stopped us. I know it was after 6.

Q. How long were you detained?

A. About 20 minutes.

Q. When you started on your course again after leaving the Tecumseh, according to your recollection, it was half past 6?

A. Yes.

Q. How long did you run on that west-by-north course?

A. From that time till 8; an hour and a half.

Q. How far were you from Havana light when the Tecumseh met you?

A. We couldn't see Havana light-house; we couldn't see the castle.

204 Q. What time was sunset?

A. 6.37 or 6.38.

Q. What kind of night was the 19th of July?

A. Clear night, dark, light easterly winds.

Q. Did you between 8 and 10 o'clock see any vessel following you?

A. I went below at half past 8.

Q. Up to that time, had you seen anything following you?

A. Not around there; not that night; only the Tecumseh; she kept in sight about half an hour or 20 minutes.

Q. Were the regulation lights on the ship burning at that time?

A. Yes; they were put out at sunset.

Q. What other lights were burning?

A. The usual other lights, the light in the chart-room and the light in the after-house.

Q. Was the light in the chart-room visible to an outsider?

A. It is visible in a certain point.
Q. Was the light in the after-house visible?
A. At a certain point ¾ of a point of the compass.
Q. How was the after light visible?
A. Through the doors on the after part of the house.
Q. A door on the port and starboard side?
A. Yes.
Q. What is the length of that house?
A. 10 ft.
Q. How far from the forward part of the after-house was the lantern?
A. 2 ft. from the forward part.
Q. And how far and towards where are the doors in that after-house?
205 A. Right against the after end.
Q. What are the width of the doors?
A. 2 ft.
Q. So that would be 2 ft. to take off for the doors and 2 ft. for the distance of the lantern, and that would be 6 ft. from the lantern to the nearest opening?
A. Yes.
Q. And it is through those openings only that lantern would be seen?
A. Yes.
Q. Have you made those measurements of the after-house since you have been here?
A. Yes.
Q. Have you taken the bearings from the light?
A. Yes; so as to say at w*a*ht point of compass that light would be visible. It is 4 points a quarter abaft the beam before the light is visible, and it is only open to ¾ of a point of the compass.
Q. The same on the starboard side?
A. Yes; the light is hanging right in the middle of the house.
Q. And you swear that that vessel did not depart from her west course except when she was running from half past 6 to 8 on the west-by-north course, and after that, until you went down below, half past 8, she was still running a straight west course?
A. I will swear to that.
Q. Will you swear that those lights you have mentioned on the ship were burning all that time?
A. Yes; I will swear it. We generally look at the lights every half hour.
206 Q. Where were you when the gun was fired?
A. Down below in my bunk.
Q. What carried you up?
A. I heard the gun and I came up.
Q. Did it take you long to come up?
A. No.
Q. Were you dressed?
A. In summer weather we don't wear much clothes; we don't wear no clothes in this climate.

Q. Were you all in dress parade?
A. Oh, no; we are always dressed ready for muster.
Q. What is the number of men on watch regularly?
A. 8; and when the captain is on deck, 9.
Q. When you and the captain both are on deck it makes 9?
A. Yes.
Q. You have stated when the Tecumseh came up; how do you know the time when the Tecumseh came up to you?
A. Because I know the watch had been relieved about 10 minutes before she came up, and the watch was relieved at 6, and this was 10 minutes after the watch had been relieved; no more than 10 minutes.
Q. In what direction was the Tecumseh from you?
A. On our port quarter, about southeast of us, running about a northwest direction when she came up to us.
Q. She was running in a northeast direction when she came up?
A. That was about the position she was running, coming up towards us; she was running in about a northwest direction.
Q. I don't mean when she came up to you; when you saw
207 her she was southeast of you, bearing about northeast of you?
A. Yes; bearing about northeast; she was about north-northeast.
Q. How long after you saw her before she came to you?
A. About half an hour.
Q. During that time you- ship was moving to the westward on her west course?
A. Yes.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long have you been following the sea?
A. 36 years.
Q. Have you made the trip to Havana before?
A. No.
Q. What West Indian ports have you made?
A. I have been round Porto Rico and Guantanamo and Santiago; that is about 25 years ago.
Q. How old are you?
A. Near 50.
Q. How did you get your position at the time the Tecumseh boarded you—the position of the ship relative to the land?
A. About 13 or 14 miles off from land; right square off the nearest point of land.
Q. And how far were you from Morro light?
A. Couldn't see the light-house then, not with the glasses. Without the glasses we couldn't see it at all, and we couldn't see it with the glasses.
Q. Do you know how far that light-house can be seen in daylight?
A. I don't know how far in the daytime. I imagine very
208 nearly as far in the daytime as night.
Q. I understood you to say you didn't notice the light-house

when you passed Havana on a direct north-and-south line drawn through Morro. You didn't notice when you passed?

A. I didn't say that.

Q. I understood you to say you didn't notice when you passed that point.

A. I didn't say that point. I said we were abreast of the light at 8.30; the light bore south at 8.30.

Q. And how far off did you make the light to be then?

A. 15 or 16 miles by my calculation.

Q. And you had been sailing in that course from the time you met the Tecumseh?

A. West by north until 8 o'clock.

Q. What is the bearing of the coast there?

A. About east and west.

Q. Then, you hadn't gotten any further from land at 8.30 than 6?

A. Yes; because we hauled the ship a point.

Q. You said 14 or 15 miles when the Tecumseh boarded you from the nearest point, and you said the same distance later——

A. I said 16 or 17.

Q. You kept the official log of the ship?

A. I did.

Q. Didn't you put in there the best knowledge you had of your position whenever you recorded it?

A. Yes; if we had proper bearings of the lights; 4-point bearings or cross-bearings would be the proper position.

Q. Now, here you have your entry: 8.30, Havana light bearing south 10 miles.

209 A. Yes; we didn't have no bearing of the light.

Q. You now say 16 or 17 miles?

A. About that.

Q. Didn't you at the time you made this entry put down the best knowledge of your position you had then?

A. No; I knew the ship was further off, and as we had no point bearings, I put down less than the actual distance was.

Q. Why didn't you put it down the best you knew?

A. As I considered at 10 miles off the land was a long way off without having any bearings.

Q. You knew this: you knew you had been warned by the blockading ship a couple of hours before that to go further off the shore?

A. Yes.

Q. And you had been informed than that the whole coast was blockaded, and that you were likely to meet other ships as you went along?

A. Yes.

Q. Didn't it occur to you by putting your distance here on your chart nearer to shore than you actually were that you were endangering yourself by showing you hadn't obeyed instructions?

A. No; I didn't, because any vessel coming along the coast would know we were further off at the time as well as we did.

Q. Why didn't you put down a 4-point bearing when the light was in full sight?

A. We were too far off to see the 4 points.

Q. What time do they light that light?

A. I suppose they light it at sunset.

Q. And a few minutes after sunset you left the Tecumseh?

A. Yes; shortly after we left the Tecumseh was sunset.

210 Q. When did you first see Havana light that night?

A. Shortly before 8.

Q. And what was the bearing when you first saw it?

A. A point before the beam, south by west.

Q. Wouldn't that give you the distance, seeing it then and then keeping it in sight?

Q. It would if we had taken particular notice. We could have taken 4-point bearing then until we had gotten past it.

Q. You say you came on deck when the gun was fired?

A. Yes.

Q. Did you notice the direction then of Morro light?

A. Couldn't see it—not off the deck.

Q. Did you go on the bridge?

A. Yes.

Q. Could you see it there?

A. No; I couldn't see it off the bridge. I had to go higher still to see it.

Q. Did you see it?

A. Yes; I saw it from the compass pole, about 15 ft. above the bridge.

Q. What direction was it in then?

A. The light bearing southeast by south half south.

Q. Was anything said about the light by the capturing officer, or anything spoken about your position at that time?

A. I couldn't say. I don't recollect them saying anything.

—. I don't know whether you have got the position of Havana light at the time of the boarding by the Tecumseh. You say you couldn't see it?

A. I couldn't see it at all.

211 Q. Then 8 o'clock was the first you saw it?

A. Shortly before 8.

Q. Then you kept it in view until after you went below?

A. Yes; until I went below; that is the last I saw it from the deck or bridge.

Q. I notice here on your log that you start "from Halifax, N. S., towards Kingston and Vera Cruz" until the morning of the day you were captured, then you say Vera Cruz and Kingston.

A. Vera Cruz was our destination.

Q. All except the last page reads Kingston and Vera Cruz; the last reads Vera Cruz.

A. Vera Cruz we were bound to first, to my knowledge; Vera Cruz and Kingston was our destination.

Q. You didn't know of any instructions being given other than in the ship's papers?

A. I didn't know of anything other than the instructions that the voyage — for Vera Cruz and Kingston.

Q. Where did you first understand you were first going to make a landing?

A. Vera Cruz.

Q. And you never heard anything about going to Sagua?

A. Our route was from Halifax to Vera Cruz and Kingston.

Q. Did you understand from the very start you were going to Vera Cruz first?

A. Yes.

Q. Why did you put it down Kingston and Vera Cruz?

A. I must have made a mistake. Vera Cruz was our first port of call.

212 Q. If you had known, as mate of that vessel, that your master had secret instructions to land on the north coast of Cuba, would you have gone on the ship?

A. Not if he had secret instructions, I wouldn't. I don't think there were any secret instructions. I heard Captain Farquhar sa-ing we were not to go near any blockaded port.

Q. Did you hear Capt. Farquhar say to land at Sagua or Caybarien?

A. No; I didn't hear any such thing.

Q. You heard it now, that he said it was so.

Q. I heard Capt. Farquhar say not to go to any blockaded ports.

Q. Did you hear Capt. Malcolm testify yesterday? You heard him testify he had these verbal instructions to go and land his cargo at Sagua or Caybarien?

A. Yes; if it was not blockaded.

Q. You never heard anything about that until after you were seized?

A. No.

Q. When did you first hear that he had such instructions as that?

A. Until here.

Q. In court?

A. Yes.

Q. What I ask you is, would you have sailed on a ship with such instructions as that if you had known it? Wouldn't you have protested against it?

A. If I had known of danger, I would.

Q. You knew you were going through the blockading fleet, in close proximity?

A. Yes; but we had orders not to go near a blockaded port.

Q. Had you known the master of this ship had verbal instructions to land on that coast, part of which you knew to be blockaded, wouldn't you have protested against sailing under such orders?

213 A. No; I wouldn't because our instructions was not to go near a blockaded port, and I know if there was any danger we were not to go near it.

Q. How far do you call near?

A. Keeping out of danger, I suppose; we were a long way out of land.

Q. Sometimes you were 3 or 4 miles of it?

A. That was in mid-channel; you can't help it, with land on both sides—shoals on one side and land on the other.

Q. Have you ever been to Vera Cruz before?

A. No.

Q. You say you are about 50?

A. About that.

Q. During the blockade of the southern ports during the civil war, were you there?

A. I was on the other side of the Atlantic; I didn't come this side.

Q. You spoke about giving the ship the benefit of the doubt; what do you mean?

A. Giving the ship the benefit of the doubt means letting the ship have the benefit, if any, of the distance off shore—that is, like soundings, when they lost a ship, they said, why didn't the captain give the ship the benefit of the doubt? If he had given the ship the benefit of the doubt and run in deep water, he would not have lost his ship. It was one of the best boats the Allens lost by not giving the ship the benefit of the doubt.

214 LEVI BURSEY sworn.

By Mr. BARKER:

Q. What is your position on the Newfoundland?

A. Second mate.

Q. How long have you been on her?

A. I have been on her this trip and the last trip, too. I was paid off in Halifax.

Q. Were you second mate the last trip?

A. Yes, and second mate since March. We pay off every trip.

Q. Were you on watch on the evening of the 19 July?

A. Yes.

Q. What hour?

A. I was on from 4 to 6.

Q. When did you go off?

A. About half past 6, after the Tecumseh left us. I was on deck. The mate had gone to his tea.

Q. That was quarter to 6.

A. I didn't keep any log.

Q. Did you keep no log at all?

A. I kept no log for the voyage.

Q. You are speaking now from memory?

A. Yes.

Q. And you were on deck until half past 6?

A. Yes.

Q. Then you went off?

A. Yes.

Q. Until when?

A. Until 8 o'clock.

215 Q. Who did you relieve when you went on deck at 8 o'clock?

A. I relieved the mate.

Q. At that time were the lights lit on the vessel?

A. Yes; and burning bright.

Q. The masthead?

A. Yes.

Q. And the side light?

A. Yes.

Q. And what other lights are on the ship?

A. The binnacle lights. That is all I know about.

Q. Those lights you mentioned were lit and burning brightly?

A. Yes.

Q. Were they put out between 8, when you came on deck, at any time and 10, when the Mayflower captured you?

A. No; they were not put out.

Q. You are perfectly sure of that?

—. Yes; I am perfectly sure of that.

Q. What course did you run after 8 o'clock?

A. Steered west in my watch.

Q. You found the vessel on a west course when you took charge?

A. Yes; she was on a west course then.

Q. While you were on deck, between 8 and 10, did you at any time see any vessel of any kind following you?

A. I saw no vessel whatever.

Q. When did you first see the Mayflower?

A. I saw her about 5 minutes before the gun was fired, to my knowledge. It may be more, it may be less. I didn't see the ship at all. I only saw the light.

216 Q. Was it a search-light?

A. Yes.

Q. You didn't see the ship at all until the search-light was put upon your vessel?

A. No.

Q. And that, you think, was 5 minutes, maybe more or less, before the gun was fired?

A. Yes; I reckon it was that; right astern, pretty near astern.

Cross-examination by the DISTRICT ATTORNEY:

Q. When you went on deck, what was the bearing of Morro?

A. I didn't take the bearings.

Q. You know about what; your recollection about it.

A. I have no recollection of the light. I went on the bridge. I saw the light as I was passing. I didn't take any bearing of the light. I have no recollection of it. I know I saw the light, and that was all.

Q. You were then running on a west course?

A. Running on a west course.

WILLIAM CODY sworn.

By Mr. BARKER:

Q. What is your position and duty on the Newfoundland?
A. Seaman and lamp-trimmer.
Q. Have you charge of the lamps?
A. Yes.
Q. On the night of the 19 July, the night you were captured, did you light the lamps?
A. Yes; and put them out.
Q. When did you light them?
217 A. Sunset.
Q. When did you put them out?
A. I put them out as the sun was going down. I had them lit, and was putting them out as the sun was going down.
Q. Did you put them where they belonged?
A. Yes; the masthead, and then the port light, and then the starboard light.
Q. You did that at sundown?
A. Yes.
Q. Did those lights remain burning in that position you put them in?
A. Yes; those were there burning when I came on at 12 o'clock, in the same position.
Q. When did you leave the deck after lighting the lamps?
A. After 8 o'clock.
Q. Were they burning then?
A. Yes.

Testimony of Horatius Shawner on Final Hearing.

HORATIUS SHAWNER sworn.

By Mr. BARKER:

Q. What is your position on the Newfoundland?
A. Shipped as sailor.
Q. What were your duties on the evening of the 19th?
A. I was at the wheel.
Q. At what hour?
A. I was at the wheel when the ship was captured.
Q. When did you take the wheel?
A. 10 to 12.
Q. Before that, how long had you been at the wheel before
218 the ship was captured?
A. I don't know how long before the ship was captured; the watch at the wheel was 2 hours.
Q. What was it when the ship was captured?
A. I have no idea what time the ship was captured; I don't know whether it was before or after 10.
Q. You have no idea when you took the wheel?
A. I don't know whether it was before 10 or after 10.

Testimony of Levi Blackmore on Final Hearing.

LEVI BLACKMORE sworn.

By Mr. BARKER:

Q. What is your position of the Newfoundland?
A. Sailor.
Q. Did you ever take the wheel?
A. Yes.
Q. Did you take the wheel on the night of the 19 July at any time?
A. Yes; from 6 to 8.
Q. Where was the vessel at 6?
A. She was off the land, a long way off.
Q. Some distance off from the land?
A. Yes.
Q. Were you east or west of Havana entrance?
A. I don't know.
Q. What course was she steering while you were at the wheel?
A. West by north.
Q. Who put her on that course?
A. The chief mate gave me the course.
219 Q. Were you on deck when the Tecumseh came up to you, that first war ship that came up to you at 6 o'clock?
A. Yes.
Q. Had she gotten to you before or after you took the wheel?
A. I don't know; I couldn't remember.
Q. How long did you run the ves-el on that course?
A. Till 8 o'clock.
Q. Was her course changed at 8?
A. A few minutes after 8 it was changed to west.
Q. Who changed it?
A. The captain.
Q. Were the lamps lit at that time?
A. Yes.
Q. Masthead?
A. Yes.
Q. Port?
A. Yes.
Q. Starboard?
A. Yes.

Cross-examination by the DISTRICT ATTORNEY:

Q. How many men were in the watch?
A. 3 in our watch; with the mate, 4.
Q. Were you on deck when she was captured?
A. Yes.
Q. How many were in the watch on deck at that time?
A. The same company—3, and 4 with the mate.
Q. Were you on deck at the time of the capture?

A. Yes.

220 Q. Was it your watch?

A. No.

Q. What were you doing there?

A. I heard the gun and I came on deck.

Q. Were you dressed?

A. No; I just had on just light clothes.

Q. How many others came up on deck with you?

A. I don't know.

Q. You don't recollect how many were on deck when the officer came aboard?

A. I don't know, I *ma* sure.

Q. Quite a little crowd?

A. I expect pretty near all were on deck, as far as I know; probably not half on deck; I didn't take notice.

Q. Have you ever been into Havana?

A. No.

Testimony of G. W. Payne on Final Hearing.

G. W. PAYNE sworn.

By Mr. BARKER:

Q. What is your first name?

A. George W.

Q. What is your position of the Newfoundland?

A. Chief engineer.

Q. How long have you been on that ship in that capacity?

A. 18 months.

Q. How long have you been chief engineer at sea?

A. 12 years.

221 Q. From the position of the engineer in a steamship, do you at any time know of your own knowledge, from the running of the engine, the actual speed the ship is making?

A. No.

Q. Does the record you keep in your office show?

A. Merely the number of revolutions of the engine.

Q. What is the full capacity in revolutions of the engines of that ship?

A. The greatest number of revolutions per minute, light ship, 65.

Q. What is the ordinary number of revolutions in running her as you did from Halifax to Havana, where you were captured?

A. The greatest number of revolutions, 60.

Q. What is the ordinary average number?

A. 60.

Q. Have you any record of the time in your office?

A. What do you mean?

Q. How do you tell the time—have you a clock there?

A. Yes.

Q. Do you keep a record of the time?

A. Yes; every watch.

Q. Do you keep a log?

A. Yes.
Q. Did you keep a log on this voyage from Halifax?
A. Yes.
Q. Have you it with you?
A. In port; yes.
Q. (Handing witness log.) Turn to page that contains the record of the evening of the 19 July. The entries in that book are made by you?
A. Yes.
222 Q. At the time the occurrences take place?
A. Yes.
Q. What is the hour, according to your record, at which the engine was stopped on the evening of the 19th?
A. By which steamer?
Q. Tecumseh.
A. 6.10.
Q. The time as recorded by you by the engine-room clock?
A. Yes.
Q. Was that the order you got to stand by or actually stopped?
A. Actually stopped.
Q. Is there any record of the order to stand by?
A. No; that is never kept.
Q. How many revolutions had you been running before that?
A. 56 during the fore part of the day; 58 from 4 to 8.
Q. Give us the revolutions after you started again. At what time did you start?
A. 6.30.
Q. Give us the revolutions after you started?
A. 58 up to the time we were stopped by the Mayflower, at 10.

Cross-examination by the DISTRICT ATTORNEY:

Q. This column of remarks, when did you make those?
A. That day.
Q. At the very time they occurred?
A. Yes.
Q. What is your age?
A. 39.
Q. Of what place are you a native?
223 A. Nova Scotia.
Q. In what town?
A. Yarmouth.
Q. Of what nationality were your parents?
A. Citizens of the United States, State of Maine.
Q. That is how you get your name?
A. Yes; George Washington never told a lie.
Q. You kept this log and put down these things just as they occurred?
A. Yes; daily.
Q. You would log up at the close of the day or just as they occurred?
Q. The speed and the consumption of coal and the steam carried

I would put down every 4 hours by the engineer of the watch, and I would copy it off in the evening, after 8 o'clock, into the log.

Q. It was put down in chalk?

A. Yes.

Q. And that is the time you wrote these remarks in your log?

A. Sometimes, and sometimes I would put them down as they occurred; generally I put down the remarks as they occurred.

Q. Did you log the incident there of being stopped by the Badger, the first vessel that stopped you?

A. Yes; and I put it down as it occurred.

Q. Just at the very time?

A. Yes.

Q. Did you log the time?

A. Yes.

Q. Sure of that?

A. Oh, yes.

224 Q. And did you log the time you went ahead, so as to show the time you were stopped?

A. I generally put down the time we were stopped and the time we go ahead. Sometimes the time is not put down just there. The hour is on the left-hand side. Generally if put down at the same time, generally on the same line.

Q. The first two vessels that stopped you, how far apart were they in time?

A. I don't remember.

Q. I notice this first entry in regard to the blockade: "Stopped by U. S. S. Badger and informed of the blockade of the entire Cuban coast; ahead at 1.50 a. m.; stopped at 4.10; ahead at 5 a. m." Do you know what that stop at 4.10 was for on the morning of the 18th?

A. I think it was to stop for daylight to go through the channel, if I am not mistaken—the Bahama channel, if I recollect—and we stopped for daylight so the captain could pick out the channel.

Q. You think, then, you stopped there 50 minutes to wait for daylight?

A. That is what I understood it was for.

Q. What part of the coast were you off then?

A. Between Cuba and the Bahama islands.

Q. Do you know what was the nearest port on the Cuban coast?

A. No; I don't.

Q. You said here that the Badger informed you of the blockade of the entire Cuban coast. Were you present with the boarding officer and Capt. Malcolm?

A. I got that from the captain.

Q. When did he tell you that?

225 A. Shortly after the Badger left us.

Q. Then you did not make that entry until after the Badger had gone?

A. No; just about that time.

Q. Your next entry is "Steaming easy to save coal"?

A. Yes.

Q. Was coal getting short?

A. Yes.

Q. On July 19th your first entry, "Owing to blockade, we continued course to westward to Jamaica for coal"?

A. Yes.

Q. Was Jamaica to the westward of you?

A. No.

Q. Was it not at the time you made that entry shorter to go eastward to Jamaica than westward?

A. I don't know.

Q. When did you make that entry?

A. I don't recollect whether I made it—very likely I made it just opposite to the hour in the log book. As a rule, I make those entries to correspond with the hour in the log book.

Q. This begins at 3 and ends at 6.

A. It would be somewhere between those hours, probably on the first line.

Q. 3 o'clock in the morning?

A. Likely to be about that time.

Q. I don't find anywhere previous to that anything about your destination or anything about that stated in your remarks. You speak of a fireman being taken sick, and wind and weather; such things as that; but of the course and all that, that is the first entry I see of anything of that sort. Why did you put down that? Who told you you were going to——

226 A. Captain Malcolm.

Q. When did he tell you that?

A. Just about the time that entry is made there; some time on that day.

Q. All these other people on the boat seemed to understand they were going to Vera Cruz—at any rate, the first mate was under the impression; in fact, supposes that they were going and directly on the way to Vera Cruz. Now, what was your idea of where you were to make a landing first?

A. When we left Halifax I had no idea where we were going to land.

Q. You made these headings here towards Vera Cruz and Kingston?

A. Yes.

Q. From July 9, when you left Halifax, you started out towards Vera Cruz and Kingston and you kept that same heading until July 19, and then you changed it from Halifax towards Kingston, Jamaica?

A. Yes.

Q. What I want to know is, why did you change it on that day?

A. Because, as we were getting short of coal, the captain decided not to continue to Vera Cruz, but go to Kingston, which was one of his ports, for coal.

Q. Was it not further from where you were to Kingston, in the way you were going, than to Vera Cruz?

A. I don't know anything about that.

Q. You were on this vessel on her previous trip?
A. Yes.
Q. And where were you about the 4th or 5th of July?
A. In Halifax.
Q. You left Halifax on this trip on the 9th?
A. Yes.

227 Q. From the 4th or 5th of July, do you know about a number of your men deserting about that time?
A. Yes.

Q. What was the trouble; what caused them to desert?
A. I don't know.
Q. You had had some trouble on the previous voyage that you made?
A. I don't know of any trouble.
Q. About this shortage of coal, have you taken on coal since you left Halifax?
A. On the last trip; no.
Q. You had coal enough to bring you from Havana to Charleston?
A. Yes.
Q. And there is coal in the bunkers now?
A. Yes.
Q. How much in there now?
A. 75 to 80 tons.
Q. You burnt about, according to your statement here, about 12 tons a day?
A. 17 tons.
Q. If you burnt 17 tons, according to your record along the first, then you reduced here to 12?
A. Yes; that is so, some days; if you notice, the consumption varies according to the speed of the ship.
Q. Coming from Havana to Charleston, I notice you burnt from 15 to 16; you made full speed, revolutions 60, 63, and 65?
A. Yes.
Q. Then you had left, when you got to Charleston, 4 or 5 days of coal, under full speed?
A. Yes; about that.

228 By the COURT:

Q. At what time did the captain tell you he was running short of coal?
A. On the 18th.
Q. Were you on deck at all after 6 o'clock on the afternoon of the 19th?
A. Yes.
Q. When were you on deck?
A. I was on deck at 8 o'clock and again at 10.
Q. Did you notice whether the running lights were burning?
A. I did not notice them. I never was in the habit of noticing them.
Q. Was there any time between 6 o'clock and 10 o'clock, between

the time the Tecumseh boarded you and the Mayflower boarded you, when you lowered your speed?

A. I think so.

Q. Any time after you left at 6.30, if that was the hour, up to 10, when the Mayflower boarded you, when your speed was diminished?

A. After 8 o'clock—I think, between 8 and half past—speed was reduced 2 or 3 revolutions.

Q. Was there any special occasion for doing that?

A. No more than the saving of coal, to reduce the consumption of coal.

Q. Were your instructions from the master or mate?

A. No; on my own responsibility.

Q. With that exception, you steamed steadily ahead from the time the Tecumseh left you until the Mayflower captured you?

A. Yes.

Q. Could you tell the course you were going the whole of that time?

A. No; I could not tell anything about the course at all.

229 Captain MALCOLM recalled.

By Mr. BARKER:

Q. The chief engineer's log records on the 18th July, "Stopped at 4.10; ahead at 5 a. m.;" and the mate's log, on the 18th July, "Stopped engine 4 a. m." Will you explain to the court what reason you had for stopping? What caused you to stop at that time and place?

A. I had compared positions previous to that with the boarding officer of the Badger. He told me that his position was 11 miles from Maternillas point. My position at that time put me 15 or 16 miles further north. I knew that if my possession was correct I would get into the Bahama channel on the course I was steering, about mid-channel. If I accepted his position it would have put me very nearly on the rocks. I ran, after I left the Badger, as far as I considered it safe, and then I stopped the ship to wait for daylight, to get my vessel safely through; that is the reason I ordered the engines stopped. As soon as I ascertained my position I started again.

Q. I find in the chief engineer's log, July 18, at 4 p. m., "Running slow; 5.15 to 9.25, increased speed." State what the reason for running slow at that time was.

A. The boarding officer of the Badger, Lieut. Titus, told me the only light I would see lit on the Cuban coast from that point until I got to Havana would be Key Francis, which, he said, had been taken by the Americans and the light. Key Francis is at the entrance of Caybarien. I saw I was going to pass that light before dark, and I felt if I could have seen that light lit it would have eased me in the position I was in, and I slowed the ship and went aloft, and I saw the light of Key Francis; after I saw it I proceeded again. That is the reason I slowed the ship down that particular time.

230 —. Did you during that time change your course from the straight course you had been running?

A. I don't remember now whether I did or not.

Q. Refresh your memory and look at the chart and say whether you did or not.

A. Not materially. I changed my course a little. I followed the line of the coast.

Q. What had you been following before?

A. The coast; but the coast there trends to the southward of west. I did not go any nearer the land than I had been sailing.

Reply.

Testimony of W. V. Pratt on final hearing in reply.

Testimony in reply.

Lieut. PRATT recalled.

By the DISTRICT ATTORNEY:

Q. With regard to the departure that you made from Havana, going to Charleston, can you state—I don't know that I can give you the nautical language—how you arrived at the point of your departure?

A. It was necessary before setting our course for Charleston—it was necessary to find some nearly fixed point. I worked out 17 miles, was about right, and the captain thought 19, and we split the difference to 18, bearing Morro light south-southeast, and so I put it in my notes, and there we laid the course, north by west.

Q. Was Morro light visibld from the bridge of the Newfoundland at that time?

A. Yes; it was visible from the deck.

Q. Had the vessel changed her position from what she was in at the time of capture?

231 A. If changed any, it was drifting out; the set was out.

Q. If anything, you werr further from the light at the time of departure than capture?

A. Yes; I saw at the forenoon watch, from 8 to 12 in the morning, which corresponds to 8 to 12 midnight, we had a strong set out that morning. A vessel lying still would tend to drift out from the coast—way from the coast.

Q. Is the current west?

A. It is variable. The particular set we had then was out from the coast. There is a set in two directions. If I should be in a position under Morro, close under all along the coast, I would frequently expect to be set in towards the coast. At that time we were getting a set to the west all outside of 20 or 15 miles, and within 10 miles we frequently get a current to the eastward and set to the off shore—to the northward. That is simply based on what we experienced lying there.

Q. I meant the current outside of 10 to 15.

A. I would expect the current outward and to the eastward. I have some pretty good idea of estimating after 35 days of estimating.

By the COURT:

Q. If you changed your position at all it would be out?

A. I made no statement that we changed it at all; if we did it would be out.

Q. This 18 miles, as I understand, was the agreed point between you and the captain to navigate the vessel?

A. Yes; we agreed on that together.

Q. Did anything in the voyage ever occur to show that you had made any error in your point of departure?

A. Not that I made any error in the point of departure.
232 From day to day we had to correct the position, due to considerable current.

Q. But nothing that showed an error in your original point of departure?

A. Nothing which led me to believe I had made any practical error in the point of departure—any appreciable error.

By the DISTRICT ATTORNEY:

Q. The position of your departure was entered on that chart?

A. It was entered.

Q. Is it there now?

A. I think not, not the exact position.

Q. Has it been changed since you put it there?

A. My position has not been changed; perhaps possibly it has been rubbed out. I should prefer some one to go over the chart and lay out south, south bearing. I don't think Captain Malcolm intended it for our departure. The mark that now is on the chart I don't think Captain Malcom intended for our departure. Our departure had been rubbed out, partially erased, from the chart, but we have agreed where that place is, which is now indicated by a little pencil dot on the chart; we have mutually agreed that that is the place.

Q. The point that I was enquiring about was to show the distance and course from Havana light of the vessel at the time you took your departure for Charleston, and that, you say, was 18 miles?

A. It was, according to the notes I have in my book, made at the time, 18 miles, Morro bearing south-southeast. The captain said now it was south-southeast half east; I am perfectly willing to grant that; I made the note in my book, Morro light 18 miles south-southeast.

By Mr. BARKER:

Q. What time of night was this?

A. 1 o'clock.

233 Q. Had the vessel started then?

A. No; she was lying still, as far as I was concerned.

Captain MALCOLM recalled.

By Mr. BARKER:

Q. State what you were going to say when stopped a few minutes ago.

A. The pencil mark on that chart off Havana at present is the correct position, copied from the chart that I was using at the time I made those marks, as I have already stated; in fact, it is only very recently but I copied them from the chart I was using to show the court the general direction on one chart; that was my purpose for doing it. In regard to the position that we agreed on, I am not positive as to the distance, but I am as to the bearing, the bearing of Morro light, Morro light bearing at the time we took our departure south-southeast half east, and during the time that elapsed between the time of stopping and taking our departure we had been drifting with the current, which I don't think is offshore, because my course along the coast should have carried me further off than it did, and from Cardenas all along the coast I found the current setting a little in towards the land. At the same time it was running a little easterly, probably east by south, and we found the next day, when we got our observations, at noon, that the correct position for the ship was to the southward and eastward of where she should have been by the log—about 20 miles in 11 hours, I think. That is all I have to say.

Q. How many miles from that point to the light-ship at Charleston?

A. I don't remember exactly; about 600.

Q. What does the mate's log show?

A. The distance run by the log—476.

Q. How was it to be accounted for?

234 A. During the passage Lieut. Pratt and I agreed, and we allowed the speed of the vessel off Havana to Charleston 8 knots and allowed 2 knots for current, making 10 miles an hour; that is what we both agreed upon coming up.

235 *Extract from Log — Mayflower.*

Extract from log of the U. S. S. Mayflower, covering the period from 8 p. m. until midnight of July 19, 1898.

8 p. m. to midnight.—Standing across entrance to Havana, course E. N. E. 60 turns, until 8.20, when, Morro bearing S. by W. ½ W. and distant about six miles, sighted light about two miles distant, bearing N. by W. Stood for it and went full speed. At 8.40 put on forced draught, 135 to 145 turns. Light disappeared and finally reappeared more to w'd. Headed for it again about N. W., when light disappeared. Stood on this course, N. W., about 30 minutes, when suddenly light showed bright on port beam, bearing S. W. Headed for it, course S. W., time about 9.10; then light disappeared.

Stood S. W. about 20 minutes, when light appeared again,
236 bearing N. W., time 9.35. Stood for it, heading N. W. Went to general quarters at 9.35. Saw no side lights at any time.

(Signed) W. V. PRATT,
Ensign, U. S. N.

From 9.35 to 9.55 standing for ship's white light, steering N. W., gradually changing to W. N. W. to keep it ahead. At 10.00 overhauled the vessel and brought her to with a blank charge. Morro light was bearing at this time S. S. E. ½ E., distant about 17 miles. She was standing to the n'd of west when overhauled. Sent Lieut. Culver to board her, who returned at 10.45 with her captain. The ship was the steamer Newfoundland, from Halifax. After examining her captain and papers the commanding officer decided to send her to Charleston for adjudication. Ensign Pratt was sent on board with the following prize crew, whose accounts were closed: M. J. Nolan, cox'n; R. M. O'Connor, G. M., 2 C.; A. Nelson, sea.; J. W. Bennett, Q. M., 3 C.; Chas. E. Botts, corp'l; Jno. A. Dixon, P. M.; James O'Brien, P. M.; Adrian Fanteux, P. M. Ensign Pratt
237 had orders to proceed to Charleston, S. C., and report to the senior naval officer present, and to deliver the "Newfoundland" to the judge of the U. S. district court or to the U. S. prize commissioners at that place. At end of watch, lying to awaiting return of our boat from the Newfoundland. No other ships of the blockading squadron were within signal distance from 9.35 until midnight.

A. E. CULVER, *Lieutenant.*

I certify that the foregoing is a true and a complete copy of the log of the U. S. S. Mayflower from 8 p. m. until midnight of July 19, 1898.

A. E. CULVER,
Lieut. U. S. N., Navigating Officer.

238 *Memorandum Attached to Chart.*

In the District Court of the United States for the District of South Carolina.

UNITED STATES
vs.
THE STEAMSHIP NEWFOUNDLAND and CARGO.

This chart was introduced in evidence at the trial on the examination of Frederick Malcolm, master, as showing the course and position of the steamship Newfoundland on her voyage from Halifax to the point of capture, and particularly her passage through the old Bahama channel and connected waters.

After the argument the court requested the respective opposing parties to mark on the chart the various positions mentioned in the testimony—that is, of the Newfoundland—as testified to by the

master of the U. S. ship of war Mayflower and of the U. S. ship of war Tecumseh, as located by a diagram or sketch prepared by Lieut. Culver. It was objected at the trial by Mr. Barker, proctor for the respondents, owners of the ship and cargo, that the testimony of the witness for the plaintiff who undertook to fix the position of the several vessels and to locate the same on the diagram or on the chart was incompetent, and either hearsay or mere guesswork. The objection was overruled and the testimony admitted; to which the proctor for the respondents excepted.

The clerk will include this paper in the record.

WM. H. BRAWLEY, *U. S. Judge.*

17 Sept., 1898.

239 *Opinion on Final Hearing.*

Filed 12 Sept., 1898.

UNITED STATES OF AMERICA, *District of South Carolina.*

In the District Court. In Admiralty.

THE UNITED STATES *vs.* THE "NEWFOUNDLAND." } Opinion.

BRAWLEY, *District Judge:*

The opinion, filed August 17th, on the preliminary hearing, based upon the testimony *in preparatorio*, sets forth the facts relating to the conduct of the Newfoundland up to the evening of July 19th, when she was captured off the port of Havana, and the cause is now before me upon an order for further proof, and the additional testimony relates to occurrences at the time of and immediately preceding the seizure.

As was stated in that opinion, a mere suspicion of an intention to violate the blockade, however well founded, is not sufficient ground for condemnation. There must be some overt act denoting an attempt to do the thing forbidden; some fact, in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution.

The precise question now to be considered is whether there is sufficient evidence of acts denoting the intention to break the blockade at Havana, for to that point the additional testimony has been directed. Upon the preliminary hearing, the court was led to believe that the American consul at Halifax was in posses-
240 sion of information that would have an important bearing upon the issue, but no testimony from that quarter has been offered.

Actual entrance into a blockaded port rarely can be and need not be proved, for if that were so captures would cease to be possible, and as no instrument has yet been devised by which the operations of the human mind can with certainty be disclosed and intentions

must be inferred from acts, so it must be that in all cases of this nature proof must rest largely upon presumptions, and accordingly as those presumptions are or are not unavoidable, acquittal or conviction follows.

Condemnation cannot justly follow proof of facts from which mere mental intention can be inferred, unless there is also proof of acts, from which the presumption necessarily arises, that there is the beginning to put into execution the unlawful intent. The sailing for a prohibited port, after knowledge of the blockade, with intent to enter, is held to be such overt act. So the appearance before a blockaded port for the alleged purpose of inquiry, when the blockade is generally known, has been held to be a breach of the blockade, on the ground that such approach would afford great facility for eluding it, and knowledge honestly sought could be obtained elsewhere.

Sir William Scott is the great luminary from which we derive most of our light on the law of prizes. He regarded the breaking of a blockade as an act of deep turpitude. In that opinion I do not agree, perhaps from an early experience of and modest participation in some of its benefits, and I am aware that, notwithstanding his great ability, his purity of character, and charming manners, he did not escape the censure of his contemporaries, and
241 that the severity of his judgments led to the charge of "ministerial subserviency."

In the Neutralitet, 6 Rob., 35, with a vigour and beauty of diction which must charm if it does not convince, he thus states the law: "It will not be necessary in the present case to lay down a general principle on this point, but I am disposed to agree to a position advanced in argument that a belligerent is not called upon to admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under the pretence of going further, approach Cyprés, close up to the blockade port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption *de jure* that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intention, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war."

Describing the catholic character of the prize jurisdiction, he thus expressed himself: "I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me, namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without dis-
242 tinction, to independent States, some happening to be neutral and some to be belligerent. The seat of judicial au-

thority is indeed locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." 2 Rob., 295.

With this statement of the principles of law generally applicable in cases of this nature, the circumstances attending the capture will now be considered as bearing upon the charge that the Newfoundland was loitering in the neighborhood of Havana with intent to enter. Lieut. Evans, in command of the U. S. S. Tecumseh, testifies that about 5 o'clock in the afternoon of July 19th, while on his station in the blockading squadron, 6 or 8 miles to the north and eastward of Havana light and about 3½ miles from the nearest shore, he sighted the Newfoundland moving towards him on a westerly course; that he immediately stood towards her at full speed, about 10 knots, and overhauled her, sending his mate aboard to examine her papers. He estimates his position at the time as being latitude 23.15 north; longitude 82.13, and on a diagram prepared by the navigating officer of the Mayflower, and offered in evidence, he fixes her position as being unquestionably within a dotted circle; thinks that it was about the centre of the circle, but having taken no measurements at the time would not undertake to fix it closer than within 3 miles. He fixes the hour of
243 boarding at 5.35, and says that he left her "in the vicinity of 6 o'clock," she bearing off on a course about west by half north. Mate Nickerson, of the Tecumseh, fixes her position at the time of sighting the Newfoundland at 6 to 8 miles from Morro light and about 3½ to 4 miles from the nearest shore, the Newfoundland being at that time about nine miles to the northward and eastward, sailing west, the Tecumseh sailing about 4 miles to overhaul her. He fixes the hour of boarding at 5.35 exactly, and says that he returned aboard his ship about 5.50. He failed to enter upon the log of the Newfoundland the hour of boarding, as is usually and always should be done. He locates the point of boarding upon the diagram as does Lieut. Evans; saw the Newfoundland for about 10 minutes after she stood off one or two points to the north of west, and says "it began to settle down dusk then."

Ensign Pratt, of the Mayflower, whose watch began at 8 o'clock, testifies that about 8.20 he picked up a small light bearing north by west from him; reported the same to the commanding officer, who ordered the ship headed for it north by west and the engines rung ahead full speed. Shortly after heading for it the light was lost, but, standing on the same course about 20 minutes and putting on forced draft, the light was picked up again a little to the westward. Altering his course and heading north-northwest, the light shortly disappeared again. He gradually changed his course to the westward until he headed about northwest, standing on that course

about 30 minutes, still not seeing the light, when, about 9.10, he sighted it again, bearing southwest on his port beam and inshore; headed for it again and stood on until about 9.30, when the light was seen outshore of him on his starboard beam and headed
244 for it again and came up with her at 10 o'clock. From subsequent developments it is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland, visible only when nearly abeam through the doors on either side. It would be open only to about ¾ of a point of the compass, and the Mayflower at full speed, making at times 16 miles an hour, would pass the point of visibility, until by changing her course it would again become visible and be picked up, first on one quarter, then on the other. When the light was first seen the Mayflower was heading east-northeast and the light was bearing north by west from her, a point forward of the port beam, and estimated to be from 2 to 3 miles distant. No other lights were seen on the Newfoundland until she was overhauled. At that time all of the regulation lights were found to be burning brightly.

Lieut. Culver, navigating officer of the Mayflower, describes the chase substantially as above and exhibits a tracing made on July 20th, showing the estimated positions of the respective vessels at the time when the light was first discovered and at the time of the capture and the course sailed by each.

Commander Mackensie, of the Mayflower, was the senior officer of the blockade off Havana. The Mayflower covered about 5 points of the compass on the bearing from Morro light and had been on that station during the month of July. He says that about 8.30 a faint light was reported about north by west of him, which he thought was a plain lantern. He describes the chase and locates the positions of the two vessels on the tracing prepared by Lieut. Culver. From this testimony and upon this diagram it would
245 appear that the Newfoundland when boarded by the Tecumseh was at a point within a circle whose centre is 10¾ miles from Morro light, whose bearing was southwest ½ west.

The testimony from the Newfoundland relating to the same matter will now be stated.

Captain Malcolm, the master, says that he was boarded by the mate of the Tecumseh 14 miles off shore—off the nearest land—while sailing on a westward course; that the boarding officer, after examining his papers, advised him not to go any nearer the land lest he should get a shell into him, and left him at 6.30; that thereafter he stood on a course one point north of west until 8 o'clock, when the Havana light bore about south by west, and from that time he put his ship back on a course due west, which he followed until boarded by the Mayflower. He exhibits a chart, on which he has marked his course, and says that at 8.30 he passed Havana light, being 17½ miles from it; that at 10 o'clock, when boarded by the Mayflower, he was 21 miles from Havana light, which bore then southeast by south half south.

Salkus, the mate of the Newfoundland, testifies to the boarding

by Tecumseh at 6.10, and that the Havana light-house and Morro castle *was* not visible; that they started on their course at 6.30, and at 8.30 were abreast of Havana light, which bore south about 16 or 17 miles. In explanation of the entry in his log he says that he took no bearings at the time of the entry and knew that the ship was farther off than ten miles. He says that at the time of the capture Morro light was not visible from the bridge, but that he saw it from the compass pole, 15 feet above the bridge.

Payne, the engineer, testifies to the boarding by the Te-
246 cumseh at 6.10, and his log contains an entry showing that the engines stopped at 6.10 and started again at 6.30.

It thus appears that there is a wide divergence in the testimony as to the point at which the Newfoundland was when boarded by the Tecumseh, and some divergence as to the time of such boarding. Lieut. Evans and his mate fix this location within a circle whose radius is 3 miles. They say that they are certain as to her location within 3 miles, and believe that she was about the centre of that circle, which is 10½ miles from Morro light. Captain Malcolm and his mate fix the location at a point 24 miles from Morro light, 13½ miles from the centre of the circle above referred to, and 10½ miles from that point of the circle nearest to the Newfoundland.

There is a marked discrepancy, and the first point to be decided is which is correct. Applying the usual tests by which testimony is weighed—the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds—there can be no doubt that there is a preponderance of probability in favour of that side which, having no interest in the controversy, has the greater opportunity of knowledge.

Lieut. Evans and his mate were on cruising grounds with which they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night. They were within 3 or 4 miles of the shore, with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education,
247 character, and intelligence, and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

Neither Captain Malcolm nor his mate were familiar with the locality; the former had once before been to Havana; the latter, never. Their interest is obvious. I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the Newfoundland within the described circle when boarded by the Tecumseh. I am not so clear as to the time. The mate Nickerson fixes it at 5.35 precisely, and says that he returned to the Tecumseh at 5.50, but he says that he watched the Newfoundland for about ten minutes after she left, when "it began to settle down dusk."

The sun set in that latitude on that day about 6.30, and there is little twilight.

The officers of the Newfoundland fix the hour of boarding at 6.10 and time of departure at 6.30, and these figures are entered upon the engineer's log. This log has been in possession of the claimant since the capture, and some erasures appear in another part which may hereafter call for comment, and it therefore cannot be accepted as absolute verity; but giving the ship the benefit of the reasonable doubt which the testimony warrants, assuming that she sailed at 6.30, she is next seen by Ensign Pratt about 8.20, when he sighted a small light bearing north by west from the Mayflower, whose station on the cruising ground lay next west of the Tecumseh and whose position at that time was about six miles north by west from Morro light. This small light was estimated to be about 2 or 3 miles from the Mayflower. The mate of the Newfoundland made this
248 entry upon her log: "8.30, Havana light bearing south 10 .miles." If this testimony is taken as true, this would place the Newfoundland at a point 7 miles from the center of the circle adopted as the point of departure, and 10 miles from the extreme western circumference of it, and it would follow that she had consumed two hours in making that distance. As her speed during her voyage was on an average nearly 8 knots an hour, there is a considerable margin of time to be accounted for, which she endeavours to do by fixing her location at 8.30 at a point 17 miles from Havana. This is the testimony of her master, and the mate concurs in it, saying that the entry in his log was not an accurate statement of the ship's position at that time; that it was only intended to show that she was at least 10 miles from Havana light. It is not necessary to discuss nor decide now how far a ship is concluded by the entries in her log. If the party making such entry is shown to have been drunk at the time or habitually careless, or if made in a perfunctory way, without observations or the opportunity of observation, little weight might be given it; but the log being intended to be a correct record of the facts contained therein, an entry made with full knowledge and opportunity of ascertaining the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed. If it is the result of a mistake, there must be conclusive evidence of the mistake. It is sufficient to say that such evidence has not been adduced here, and the entry upon the log, confirmed as it is by the testimony from the Mayflower, fixes the position of the Newfoundland at 8.30 at a point about 10 miles from the Havana light. From that point to the point of seizure her course can be marked
249 with sufficient accuracy. That she sailed on a straight course from 8.30 to 10 o'clock, and that such course led her away from the entrance into the port of Havana, is entirely clear, whether the point was 17 miles from Morro light, as claimed by the Mayflower, or 21 miles, as claimed by the Newfoundland, or 18 miles, as agreed upon by her master and Ensign Pratt as the point from which they took their departure after the seizure, when they started upon their voyage to Charleston.

The next incriminating charge is that the Newfoundland was sailing without lights. Ensign Pratt, who first sighted her, says he

picked up a small light. All the witnesses from the Mayflower describe this light as that from an ordinary lantern, and not the masthead light. None of these witnesses saw any of the regulation lights until they came up with her, about 10 o'clock, when they were all brightly burning. After the chase began these regulation running lights, being visible only two points abaft the beam, would naturally not be seen.

Coming westward from the point where she left the Tecumseh to the point where the faint light was sighted, her masthead light, whose visibility by the regulations is at least 5 miles, should certainly have been seen if there was proper vigilance aboard the Mayflower. That Ensign Pratt was vigilant is demonstrated by the fact that he picked up the dim light 2 or 3 miles off at 8.20. He went on duty at 8 o'clock. The officer who had the watch before that hour was not examined, nor were the lookouts, who are described by Commander Mackensie as uncommonly efficient men. As it is, the testimony leaves this question open to reasonable doubt. While it is probable that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he
250 descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of visibility.

The witnesses from the Newfoundland, including the sailor who lit them, all testify that the lights were lit at the usual hour and they were all burning when she was overhauled.

Commander Mackenzie and other witnesses from the Mayflower all testify that the small light already described was the only one seen; that there were no stray lights, such as are commonly seen aboard a steamer in the night time.

Taking the point of departure to be somewhere within the circle already described and the time of departure at 6.30, and the rate of speed at nearly 8 knots, and following the courses described—west by north until 8 o'clock, and then due west until 10 o'clock—and plotting it upon the chart, I must conclude that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the May flower at the point of capture at 10 o'clock, unless she had loitered somewhere upon her route.

Outside the domain of the exact sciences, absolute certainty is rarely attainable, and there must always be an element of doubt as to every transaction the proof of which rests upon fallible human testimony, nowhere more fallible than in estimates of location and distances upon water.

With some misgivings as to the rectitude of my judgment, but with none as to the rectitude of the considerations which move it, and fully conscious of an imperfection in nautical knowledge which in a case of this nature may lead unconsciously to error, my conclusion is that the Newfoundland, with full knowledge
251 of the blockade at Havana, approached sufficiently near to that port on the night of July 19th to render it easy to elude the blockade, and tarried there sufficiently long to enable her to

discover whether she could do so with safety, and this finding renders it necessary for her to show from all the circumstances preceding, accompanying, or following that act that her presence there was innocent. It is earnestly contended that, being a neutral vessel, not laden with contraband of war, her capture 18 or 20 miles from the port of Havana, while sailing away from it and on the open sea, was a marine trespass. This contention rests upon the ground that there is no sovereignty over the sea, and that it is free to the ships of all nations, a proposition admittedly true in times of peace, but not unqualifiedly true in time of war, for the right of search and the right of blockade conceded to belligerents by the law of nations rests upon the negation of it. The right of blockade can only be effectively exercised by conceding to the belligerent a right of dominion, precarious it may be in tenure, transient in duration, and restricted in area, but none the less a dominion and control over the waters surrounding the place beset. The great object of the blockade is to cut off all communication between those who are within and those who are without the port blockaded, and the law accords to the belligerent nation certain rights or rather privileges undefined by any written code, and in the reason of things indefinable, whereby such object may be effected. All these oppressive incidents, generally vexatious to neutrals, often mischievous, and sometimes unjust, are inherent in the law itself. Among them is
252 that which requires a neutral, found in suspicious proximity to a blockaded port, under circumstances indicating an intention to enter, to give an account of herself. If innocent, she can generally do so.

We will now look into the character and conduct of the Newfoundland to see whether her presence off Havana is consistent with innocent intent.

She is a small steamship, lately employed in the sealing business. She sailed from Halifax July 9th, loaded with a cargo of provisions, under command of Captain Malcolm, who was employed for that voyage. She had two clearances, one for Kingston and one for Vera Cruz. Commander Mackenzie testifies that it is not the practice of any American custom-house to give two clearances. Captain Malcolm says that this is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had cargo for each. We have no statute prescribing any regulation on this subject, and wherever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port to give such separate clearances. While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of grave and just suspicion that her real and primary destination was to neither of those ports, as subsequent events proved. Captain Malcolm in his testimony *in preparatorio* said that his verbal instructions were to sail for Caibairien or Sagua la Grande, and if those ports were blockaded to go to Kingston and cable for orders. For reasons, into which it is not the province of this court to inquire, neither Sagua

nor Caibairien were included among the ports blockaded under the proclamation of the President, and he had the right to go to
253 either. Whether in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry; certain it is that he would have committed no offence cognizable here.

Taking his course to the southward, he next appears off Nuevitas, where he is boarded by Lieut. Titus, of U. S. S. Badger, and is informed by him that the whole coast of Cuba is blockaded. The case is not presented in an aspect which requires any determination of the question whether that sort of a blockade was effective or legal, as he did not go to either Sagua or Caibairien for the purpose of testing its validity, which he might well have done. According to his testimony *in preparatorio*, and it is repeated on this hearing, he abandoned all thought of entering either of those ports upon hearing that they were blockaded. His course, then, should have been around the eastern end of the Island of Cuba to Kingston, by way of Cape Maysi, for the course around the western end, by Cape Antonio, was nearly a thousand miles further. In these days of sharp competition intelligent men do not make such long detours in the prosecution of legitimate business. The explanation given is that he wanted to satisfy his charterers by showing them that he had passed by the port to which he was directed to go, and, further, that he apprehended that he would subject himself to suspicion by changing his course at that time. The answer to this is obvious. His charterers did not instruct him to go by the ports of Sagua and Caibairien, but to go to them, and if he did not intend to do that his proceeding in that direction was such a futile, time-consuming, and coal-consuming venture that it staggers credulity to accept it as the true reason; nor does the other reason given seem much more
254 satisfactory. There was nothing unlawful in his setting out for Sagua or any other open port in Cuba, and if, after information of the blockade, it became necessary to change his course in order to go by the shortest route to Kingston, his contingent destination, there would have been no risk in disclosing the truth. In this, as in most of the affairs of life, the straightforward course would have been the wisest course. That it was not taken suggests the conclusion that neither Sagua nor Caibairien was the real destination. It appears from the testimony that neither at the time of capture nor afterwards was anything ever heard about Sagua or Caibairien until it came out in the examination of Captain Malcolm before the prize commissioners. None of the other officers of the ship appear to have known about it. The mate seems to have thought that they were going to Vera Cruz. In the engineer's log there appears every day from July 9th to July 18th, inclusive, a line at the top of the page containing the words, "from Halifax to Vera Cruz and —— Cuba." The word Kingston is written over and partially obliterates the word Cuba. There is a blank space before the word "Cuba," evidently intended to be filled in. "Havana" would about fill it. The engineer appeared to be the most intelli-

gent man on the ship after the master. From this entry on his log it is plain that he knew that the ship's destination was Cuba, and there would seem to be no good reason why the name of the port should have been left blank if it was Sagua or any other open port. In the absence of any testimony confirming the master's statement that his instructions were to go to Sagua or Caibairien, and there being nothing in his conduct showing that that was his real destination, I must hold it to have been a pretensive destination,
255 and his appearance before Havana is therefore not satisfactorily explained.

Lieutenant Culver, of the Mayflower, who boarded her, says that when he asked Captain Malcolm where he was bound he was very vague in his replies, sometimes saying Kingston and sometimes saying Vera Cruz, and when asked whether he was shaping his course by way of Cape San Antonio he replied that he hadn't made up his mind. In the same conversation he said that he had been making 8 knots an hour from the time he was boarded by the Tecumseh to time of overhauling. To Commander Mackenzie, on the Mayflower, he said he was making for Vera Cruz, if he had coal enough, and then to Kingston. If he did not have enough coal, he was going to Kingston in order to take on coal. To Lieut. Pratt, the prize master on the voyage up to Charleston, he said that he was bound for Vera Cruz.

Captain Malcolm says, in his testimony, that his instructions were to go to Kingston if he found the ports of Sagua and Caibairien blockaded, and from there he was to cable for instructions, and that Kingston was his destination; that he had plenty of coal to get to Kingston, but not enough to go to Vera Cruz and then Kingston.

It must be conceded that there is no proof of any attempt to enter the port of Havana—that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartung, the cases relied on by the Government. All of these cases arose before the days of steam power, but the principles upon which they rest, and which I hold to be sound principles, require their application to conditions now prevailing, when the use of
256 steam power renders the eluding of blockades a far more facile undertaking, and I feel compelled to hold that the whole purpose of a blockade would be rendered nugatory if a steam vessel is allowed, after notice, to approach in the night time so near to a blockaded port as to be able to see signals from the shore and to watch for the opportunity of entering, if it should appear that the coast is clear or the vigilance of the belligerent cruisers is for the time relaxed. A ship so approaching lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade, and there is a necessary presumption of sinister motive, which must be rebutted by positive proof, that her presence there is innocent; that she is there either from some necessity or in the course of a voyage which requires her to pass that way. I feel

bound to hold that the weight of the testimony is on the side of the Government in fixing her position at 6 o'clock at a point from 5 to 8 miles from the nearest shore and not as fixed by her officers, at a point about 14 miles from the shore; for why should the mate of the Tecumseh have warned them to keep off farther from the shore, a warning which they admit having received, if they were where they claimed to have been—far beyond the reach of any shells, against which the warning was given? For this and for the reasons already stated I must conclude that she was at that point at 6 o'clock, and that at 8.30 she was at a point not more than 10 miles distant and not more than 10 miles from Havana light, just outside the cruising grounds of the blockading fleet, from which she could readily see whether it was safe for her to attempt to enter. Having denied that she was there, and having failed to sustain that denial by adequate proof, and having failed to give a satisfactory account of
257 her being in that neighborhood at all, I am compelled to condemn both |ship and cargo. I do so with great reluctance. The attempt to carry a cargo of provisions to a starving people, even for purposes of speculation, excites rather sympathy than condemnation, and confiscation is a harsh punishment for such offense.

No country has ever yet been brought to terms of peace merely by restrictions upon its commerce with neutrals, for the great issues of war are decided by the contests of armies upon land and of navies upon the sea. In their ultimate decision the seizure and confiscation of private property, whether of enemy or of neutral, weighs as lightly as a feather floating on the summer breeze; but until some Amphictyonic council of the civilized States now models the law of nations and adopts the gospel of commercial peace in the midst of a hostile war, I am bound, sitting in this seat, to administer the ancient law as I find it, and am not permitted to soften its harsh provisions.

Both ship and cargo are the property of citizens, not merely of a neutral, but of a friendly State, and it should be remembered, it can never be forgotten, of a State which in a supreme crisis has demonstrated its sympathy and friendliness; and there may be considerations of comity and of public policy, considerations into which, sitting in this court, I have no right to enter, which may suggest as an act of grace the mitigation of the extreme demands which under the law of nations are of incontestible right.

258 *Order for Sale.*

Filed Sept. 13, 1898.

UNITED STATES OF AMERICA,
Eastern District of South Carolina.

In the District Court. In Admiralty.

THE UNITED STATES
vs.
THE STEAMSHIP NEWFOUNDLAND.

For the reasons and upon the grounds stated in the opinion of the court in this cause filed September 12, it is adjudged and decreed that the steamship Newfoundland and cargo, as she now lies in this port, be condemned, forfeited, and sold as lawful prize of war, and that writs of *venditioni exponas* issue to the marshal for said steamship and cargo.

Further ordered that said vessel and cargo be sold separately, the cargo to be sold in such manner as may be to the best interests of the Government and the captors; that said sale be made by the marshal, by public outcry, at the eastern door of the United States custom-house, in the city of Charleston, S. C., on October 11th, 1898, notice of said sale being published in the News & Courier and Evening Post, of Charleston, S. C., and the Journal of Commerce, of New York, twice a week for three weeks prior to said sale.

Further ordered that the marshal shall unload and store said cargo, keeping accurate accounts of same, and report his actings hereunder to the court.

WM. H. BRAWLEY, *U. S. Judge.*

Sept. 13, 1898.

259 *Amended Order for Sale.*

Filed Sept. 24, 1898.

THE UNITED STATES OF AMERICA,
Eastern District of South Carolina.

In the District Court. In Admiralty.

THE UNITED STATES
vs.
THE NEWFOUNDLAND.

It appearing that under the order of this court of September 13th, 1898, in this cause a sale of the cargo of the steamship Newfoundland was ordered to be made on October 11th, 1898, and it further appearing that the inventory and unloading of said cargo cannot be completed in time for the necessary advertisement of sale to be made on said date, on motion of the United States attorney—

It is ordered that the sale of the cargo of the Newfoundland be made on October 20th, 1898, in lieu and instead of October 11th, as provided in said order of September 13th.

WM. H. BRAWLEY, *U. S. Judge.*

260 *Notice of Appeal.*

Filed Sept. 22, 1898.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the District Court. In Admiralty.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE STEAMSHIP NEWFOUNDLAND and HER CARGO, Respondent. } In Prize.

Notice of appeal.

CHARLESTON, S. C., *September* 22, 1898.

SIR: The respondents appeal from the final decree of the court in this cause to the Supreme Court of the United States.

——— ———,
Proctor for James A. Farquhar, Owner of the Steamship Newfoundland, and for David Robertson and Company, Owners of the Cargo of the said Steamship.

Acceptance of Service.

CHARLESTON, S. C., *September* 22, 1898.

To C. J. C. Hutson, Esq., clerk:

I acknowledge service on me of within notice of appeal & copy of same.

ABIAL LATHROP, *U. S. Att'y.*

261 *Petition of Appeal.*

Filed 28 Sept., 1898.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the District Court. In Admiralty.

JAMES A. FARQUHAR, as Owner and Claimant of the Steamship Newfoundland, and David Robertson and Company, as Owners and Claimants of the Cargo of said Steamship, Respondents, Appellants,
against
THE UNITED STATES OF AMERICA, Plaintiff, Appellee. } In Prize.

Petition of appeal of James A. Farquhar, as owner and claimant of the steamship Newfoundland, and David Robertson and Company, as owners and claimants of the cargo of said steamship.

To the Honorable Wm. H. Brawley, judge of the district court:

The appeal of the above-named appellants respectfully showeth that on or about the nineteenth day of July, 1898, the above-named British steamship Newfoundland and her cargo were captured and seized upon the high seas by the United States ship of war called the Mayflower, Captain M. R. S. MacKenzie commanding, and was brought into the port of Charleston, South Carolina, in charge
262 of a prize crew; whereupon, on or about the 23d day of July, 1898, the United States of America, by Abial Lathrop, United States district attorney, exhibited its libel in the district court of the United States for the district of South Carolina against the British steamship Newfoundland and her cargo, alleging that said steamship was captured in attempting to enter the port of Havana; that said property was lawful prize of war, and praying that the same be condemned and sold as such, and that process of seizure be issued to that end; thereupon said vessel and cargo were seized and detained by the United States marshal for said district under the process of said district court; that process issued out of said court, having been served on Frederick N. Malcolm, master of said steamship. Claims were filed on the 5th day of August, 1898, by James A. Farquhar, of Halifax, Nova Scotia, as owner of said steamship, and by said Frederick N. Malcolm, master and bailee of the cargo on board said steamship and as agent for the owners, David Robertson and Company, of Montreal, Canada, and answers were filed separately by and on behalf of said James A. Farquhar, owner and claimant of the ship, and by and on behalf of David Robertson and Company, owners and claimants of the cargo of said steamship, to the said libel on the 8th day of August, 1898.

This cause came on to be heard before the Honorable Wm. H. Brawley, judge of the district court, on the ship's papers and proof *in preparatorio* on the 10th day of August, and the said judge

having advised thereon, a decree and order *was* entered by the
263 district judge in said court on the 15th & 17th days of August, granting leave to plaintiff to amend its original libel, and for respondents to answer thereto, and directing that further proof might be taken, and that respondents have leave to stipulate for the vessel and cargo. Amended libel by plaintiff was filed on the 17th August, 1898. Answers to said amended libel were separately filed by said James A. Farquhar, as owner and claimant of the steamship, and by David Robertson and Company, as owners and claimants of the cargo, on the 19th day of August, 1898.

That thereafter an appraisement of said vessel and of said cargo was made under an order of said court, and the vessel was appraised at eight thousand dollars and the cargo at twenty-nine thousand two hundred and forty-one dollars and sixty-three cents, and return thereof by the appraisers was filed in said court on the twenty-third day of August, 1898.

That thereafter the cause again came on to be heard before the Honorable Wm. H. Brawley, judge of the district court, upon pleadings and proofs, on or about the 30th day of August, A. D. 1898, and the said judge having advised thereon on the 12th day of September, 1898, made a final decree, which was entered in said court, condemning said steamship and cargo as lawful prize of war and ordering that the same be sold.

That thereafter, on the 22nd day of September instant, a notice of appeal was entered with the clerk of the district court and copy served on the district attorney of the United States on behalf
264 of the said respondents, James A. Farquhar, owner and claimant of the said steamship, and said David Robertson and Company, owners of said cargo.

And these appellants are advised and insist that said decree is erroneous, inasmuch as said vessel and cargo were and are not lawful prize of war and were unlawfully captured and seized.

And these appellants, for these and other reasons, appeal from the whole of said decree and from the rulings of the said district judge in favor of the said The United States of America to the Supreme Court of the United States at its next sitting, and on the said appeal they intend to have said cause heard anew in the said Supreme Court on the pleadings and proofs in the district court of South Carolina and other proof to be introduced in the said Supreme Court, and they pray that the said decree in favour of the said United States of America and every part thereof may be reversed with costs, or such other decree thereupon made as to said Supreme Court shall seem just, and that said appellees and the captors of said steamship and her cargo, for whose benefit in part said process was issued, said seizures were made, and said libels were filed, be condemned to pay to these appellants their costs and damages in the premises.

THEODORE G. BARKER,
Proctor for Respondents, Appellants.

Charleston, S. C., September 28, 1898.

Acceptance of Service.

CHARLESTON, S. C., *September* 28, 1898.

I acknowledge due service of within petition of appeal.

ABIAL LATHROP,
U. S. Attorney.

265 *Order Allowing Appeal.*

Filed Sept. 28, 1898.

THE UNITED STATES OF AMERICA, *District of South Carolina.*

In the District Court. In Admiralty.

JAMES A. FARQUHAR, Owner and Claimant of the Steamship Newfoundland, and David Robertson and Company, Owners and Claimants of the Cargo of said Steamship, Respondents, Appellants, *against* THE UNITED STATES OF AMERICA, Plaintiff, Appellee. } In Prize.

Hearing the petition of appeal in above-entitled cause to the Supreme Court of the United States, on motion of Theodore G. Barker, Esquire, proctor for respondents, appellants, it is ordered that said appeal be, and the same is, allowed.

I further certify to the honorable the Supreme Court of the United States of America that the appeal above allowed is from a decree of the district court in a cause of prize, and that the adjudication involves a question of general importance, and that the matter in dispute exceeds in value the sum of five thousand (5,000) dollars, exclusive of costs.

(Signed) WM. H. BRAWLEY, *U. S. Judge.*

Sept. 28, 1898.

Acceptance of Service.

CHARLESTON, S. C., *September* 28, 1898.

I acknowledge due service of the within order allowing appeal & certificate of the district judge.

ABIAL LATHROP, *U. S. Att'y.*

266 *Appeal Bond. Filed Oct.* 19, 1898.

THE UNITED STATES OF AMERICA:

Know all men by these presents that we, James A. Farquhar, of Halifax, Nova Scotia, and David Robertson, for himself and for the firm of David Robertson and Company, of Montreal, Dominion of Canada, and Theodore G. Barker, of Charleston, S. C., and D. B. Gilliland, of Charleston, S. C., are held and firmly bound unto the

United States of America in the full and just sum of five hundred dollars, current money of the United States, to be paid to the said United States of America or its assigns; to which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of October, in the year of our Lord 1898.

Whereas lately, at a district court of the United States for the district of South Carolina, in the fourth circuit, in a certain cause of prize between The United States of America, libellant and appellee, and The Steamship Newfoundland, of which James A. Farquhar is owner and claimant, and her cargo, of which David Robertson and Company are owners and claimants, respondents, appellants, brought into said court upon a libel for condemnation filed by Abial Lathrop, district attorney for said United States of America, a final decree was rendered against said steamship and her cargo, and the said respondents and appellants having obtained leave to remove said cause to the Supreme Court of the United States, and have prayed the reversal of said decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said obligors shall duly prosecute their said appeal to effect and
267 answer all damages and costs if they shall fail to make their plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

JAMES A. FARQUHAR. [SEAL.]
DAVID ROBERTSON. [SEAL.]
THEODORE G. BARKER. [SEAL.]
DANIEL B. GILLILAND. [SEAL.]

In presence of—

H. A. MACDONALD,
Witness to signature of James A. Farquhar.

G. T. JENKIN,
Witness to signature of David Robertson.

W. HUGER FITZSIMONS,
Witness to signatures of Theodore G. Barker and Daniel B. Gilliland.

Approved:
WM. H. BRAWLEY, *U. S. Judge.*

268 DOMINION OF CANADA, }
Province of Nova Scotia, County of Halifax, } *ss:*

To all to whom these presents shall come, Greeting:

I, W. Ernest Thompson, of Halifax, in the county of Halifax, in the province of Nova Scotia, a notary public, duly admitted and sworn, residing and practising at Halifax aforesaid, do hereby certify that H. A. Macdonald, subscribing witness to the foregoing bond or indenture, appeared before me and made oath that James A. Farquhar, mentioned in the aforesaid bond or indenture, did sign,

seal, and — his act and deed deliver the above-written or foregoing bond in his presence.

In testimony whereof I have hereunto subscribed my name and affixed my seal to these presents, at said city of Halifax, this 30th day of September, A. D. 1898.

W. ERNEST THOMPSON,
[SEAL.] *Notary Public.*

269 PROVINCE OF QUEBEC, }
District of Montreal. }

To all to whom these presents shall come, Greeting:

I, John Fair, of the city of Montreal, in the province of Quebec, a notary public, duly admitted and sworn, residing and practising at Montreal aforesaid, do hereby certify that G. T. Jenkin, subscribing witness to the foregoing bond or indenture, appeared before me and made oath that David Robertson, mentioned in the aforesaid bond or indenture, did sign, seal, and as his act and deed deliver the above-written or foregoing bond in his presence.

In testimony whereof I have hereunto subscribed my name and affixed my seal to these presents, at said city of Montreal, this fourth day of October, eighteen hundred and ninety-eight.

JOHN FAIR,
[SEAL.] *Notary Public.*

270 *Citation. Filed Sept.* 28, 1898.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

JAMES A. FARQUHAR, Owner and Claimant of Steamship Newfoundland, and David Robertson and Company, Respondents, Appellants,
against
THE UNITED STATES OF AMERICA, Plaintiff, Appellee. } Citation.

The United States of America to Abial Lathrop, district attorney of the United States for the district of South Carolina:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 31st day of October next, pursuant to an appeal filed in the clerk's office of the district court of the United States for the district of South Carolina, in the fourth circuit, wherein James A. Farquhar, owner and claimant of the steamship Newfoundland, and David Robertson and Company, owners of the cargo of said steamship, are appellants and The United States of America, by you, is appellee, to show cause, if any, why the decree rendered against said appellants as in said appeal mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 28 day of September, in the year of our Lord 1898.

(Signed) WM. H. BRAWLEY, *U. S. Judge.*

Acceptance of Service.

CHARLESTON, S. C., *Sept.* 28, 1898.

I acknowledge due service of within citation on appeal.

ABIAL LATHROP.

271 *Assignments of Error. Filed Sep.* 28, 1898.

THE UNITED STATES OF AMERICA:

In the Supreme Court. In Admiralty.

JAMES A. FARQUHAR, Owner and Claimant of Steamship Newfoundland, and David Robertson and Company, Owner- and Claimants of the Cargo of said Steamship, Respondents, Appellants,

against

THE UNITED STATES OF AMERICA, Plaintiff, Appellee.

Appeal from the district court for the district of South Carolina in a prize cause.

Assignment of Errors on Appeal.

1. The court below, the district court of the United States for the district of South Carolina, erred in not releasing the Newfoundland and her cargo on the first hearing, upon the ship's papers and proofs *in preparatorio*, the district judge having, after full argument and consideration, found that there was no evidence before the court upon which the ship and cargo could be condemned, and that—

"Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the Newfoundland, at the time of capture or at any other time, was heading for the port of Havana or any other port."

2. The district judge erred in holding, upon the hearing *in preparatorio*, that Commander Mackenzie's opinion, that the movements and conduct of the Newfoundland on the night of the capture were suspicious, furnished "ground for ordering
272 further evidence," Commander Mackenzie's opinion not being in evidence at that hearing and being in itself no legal ground for such order.

3. The district judge erred in his decree granting leave to plaintiff to amend its libel, upon which the issue had been made and joined and the hearing had been had, and to make a new case upon new pleadings and new proof, there being no evidence before the court of any attempt to break the blockade.

4. The district judge erred in his decree of August 15, in allowing plaintiff to make further proof, the facts of the case, as found by the district court (opinion and decree filed August 17), affording

no legal foundation for doubt and affording no proof of any overt act to justify the condemnation of the ship.

5. The district judge erred in overruling the exceptions of respondents to the decrees of August 15th and 17th and in trying the case on further proofs.

6. Upon the second hearing the district judge erred in admitting, as evidence of facts, the testimony of the officers of the Mayflower and Tecumseh, consisting of attempts to locate the positions of the steamship Newfoundland on the ocean in reference to Havana light, her position when she met the Tecumseh, and the positions of the Newfoundland and of the Mayflower at various times; also undertaking to locate on the chart those positions so attributed to the Newfoundland, to the Tecumseh, and to the Mayflower, and to give the latitude and longitude, the witnesses having all declared that those positions were located without taking observations at the times and were merely approximate estimates, and such estimates being based on wholly incomplete and insufficient data of calculation and not being legal proof.

273 7. The district judge erred in disregarding the uncontradicted and unimpeached testimony of the master of the Newfoundland, which located the course of the ship during the voyage through the old Bahama channel and to the point of capture and the successive positions of the ship on her westward course, her positions having been taken at the times stated by actual observation and located on the ship's chart by the ship's log and other sufficient data.

8. The district court erred in accepting as proof the estimates and opinions of the officers of the Tecumseh as to the time of her meeting and the time of her leaving the Newfoundland on the afternoon of 19th July, and basing his decree upon such estimates and opinions, without evidence of fact upon which such estimates and opinions were based, and against the otherwise uncontradicted evidence in the cause, and in disregarding the evidence which impeached the accuracy of such estimates and opinions.

9. The district court erred in finding as a conclusion of fact that the Newfoundland had "loitered" in passing the port of Havana, such conclusion being based upon a theory of inference from assumed times, places, and rate of speed of the Newfoundland, none of which were or could be proved to be correct, and most of which differed from that shown by the unimpeached testimony in defence, and which assumptions, theory, and inferences were shown to be incorrect.

10. The district court erred in accepting the theory and inference of "loitering" as evidence in the cause and as proof of an overt act committed by the Newfoundland in violation of the blockade established by the United States Government of certain ports on the island of Cuba.

274 11. The district judge erred in holding that the ocean, at a point ten miles off from the shore at Havana, and at the point of capture, a point 18 to 21 miles off from Havana, both points being outside of the cruising ground of the blockading fleet, was

prohibited water, and that the Newfoundland had been seen or taken within blockade waters.

12. The district judge erred in holding that the marine trespass committed by the commanding officer of the Mayflower upon the property of neutrals by seizing the ship Newfoundland and her cargo was justified by the alleged suspicious circumstances in the case, there being no overt act proved and no fact established in proof to which suspicion of intention could legally be attached to make out a case for condemnation of ship and cargo as lawful prize of war.

13. The district judge erred in holding as a conclusion of fact that the Newfoundland was captured when she was so near Havana entrance as to compel the conclusion that her purpose beyond a doubt was to enter that port.

14. The district judge, after admitting that there was "no proof that the Newfoundland was seen to be heading for the port of Havana," and that the testimony as to her suggested loitering "falls very far short of the proof offered" in cases cited by the plaintiff, erred in holding that a steam vessel which in the night-time passes a port "near enough to see signals from shore" (although none be proved to have been seen or made) "thereby lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade," and that "there is therein a necessary presumption of sinister motive," although the proof be that when captured she had passed the port, and was eighteen to twenty-one miles
275 away from it, sailing on a westward course, and although the proof be that her fullest steaming capacity was not more than eight knots per hour.

15. The district judge erred in holding "that the Newfoundland, with full knowledge of the blockade at Havana, approached sufficiently near to that port on the night of July 19th to render it easy to elude the blockade, and tarried there sufficiently long to enable her to discover whether she could do so with safety," the proof of plaintiff being that the port of Havana was most thoroughly guarded by a strong blockading fleet; that the master of the Newfoundland had been told by the mate of the Tecumseh about six o'clock p. m. of the same day that there were 30 war ships blockading that port; that the Newfoundland had never been nearer than ten miles from the Havana entrance, had never been nearer than two miles away from the outside lines of the blockading fleet, and when captured had passed Havana and was between eighteen and twenty-one miles to the northwest of that port, sailing on a westward course away from the island of Cuba, and in the waters of the Gulf of Mexico, and there being no proof of her tarrying near to the port of Havana to sustain a legal conclusion of fact.

THEODORE G. BARKER,
Proctor for Respondents, Appellants.

Charleston, S. C., September 28, 1898.

Acceptance of Service.

CHARLESTON, S. C., *September* 28, 1898.

I acknowledge due service of within assignments of error.

ABIAL LATHROP.

276 *Order to Transmit Record.*

And thereupon it is ordered by the court here that a transcript of the records and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Supreme Court, to be held at Washington, D. C., on the 31st day of October, 1898; and the same is transmitted accordingly.

[Seal United States District Court, Eastern District So. Ca.]

CHARLES J. C. HUTSON,
Clerk D. C. U. S., S. C.

Certification.

UNITED STATES OF AMERICA, }
District of South Carolina. }

I, Charles J. C. Hutson, clerk of the district court of the United States for the district of South Carolina, do certify that the foregoing is a full and true record of the proceedings and judgment of the said court in the therein-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of said court on this twenty-sixth day of October, A. D. 1898.

[Seal United States District Court, Eastern District So. Ca.]

CHARLES J. C. HUTSON,
Clerk D. C. U. S., S. C.

Endorsed on cover: Case No. 17,181. S. Carolina D. C. U. S. Term No., 596. James A. Farquhar, owner & claimant of the steamship "Newfoundland," & David Robertson & Company, owners of the cargo of said steamship, appellants, *vs.* The United States. Filed November 3, 1898.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898. CASE No. 596.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN ADMIRALTY.

In Prize.

JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON & COMPANY, OWNERS OF THE CARGO OF THE SAID STEAMSHIP, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

BRIEF FOR APPELLANTS, OF THEODORE G. BARKER, WITH WHOM IS G. A. R. ROWLINGS.

Statement of the Case.

On the 9th of July, 1898, the British steamship *Newfoundland*, Frederick N. Malcolm, master, under charter-party to Musgrave & Company, of Halifax, Nova Scotia, after having been openly engaged for nine days in taking on cargo, left

the port of Halifax with a cargo of flour, bacon, and canned goods under clearances and bills of lading, a part of cargo for Kingston, Jamaica, and a part for Vera Cruz, Mexico.

The charter-party was for a voyage of three months to ports of the United States, West Indies, Central and South America, &c., "including *open* Cuban ports, no contraband of war to be shipped," and the voyage was to terminate at Halifax (*fol.* 14).

Instructions from owner of vessel and from charterers to the master were "to obey instructions of shippers provided they were not at variance with terms of charter-party" (*fols.* 52 and 151). He "was on no account to attempt to enter a blockaded port" (*fol.* 45).

Before sailing from Halifax instructions were given to the master by the shippers, David Robertson & Co., of Montreal, Canada, to proceed first to the island of Cuba and to land the cargo at the port of Caybairien or at the port of Sagua la Grande, provided these ports were not blockaded, and, if they were found to be blockaded, then to proceed to Kingston, Jamaica, and there telegraph owners for instructions (*Transcript, fol.* 45).

Before leaving Halifax Captain Malcolm had inquired of charterers which ports of Cuba were under proclamation of blockade, and was furnished by Musgrave & Company with a map, which showed that Caybairien and Sagua la Grande were open ports (*fol.* 177).

The *Newfoundland*, after leaving Halifax, steered for the West Indies and passed through the "Crooked Island passage" and out into the "Old Bahama channel," and was proceeding on a westward course (*Transcript, fol.* 152), to pass through the Old Bahama channel, on the northern side of Cuba, in the direction of the ports of Caybairien and Sagua, according to her instructions.

On the morning of July 18, before daylight, at 1 o'clock a. m., when about 14 or 15 miles off the harbor of Neuvitas, she was stopped by the United States ship of war *Badger*,

Commander Albert S. Snow; one of the blockading squadron. The *Badger* was first sighted from the *Newfoundland* on her starboard bow, came around, crossed the bow, and steamed up to the *Newfoundland* on her port side; a flash light was thrown upon the *Newfoundland*, and then, after going around astern of the vessel and standing off from her again, a gun was fired by the *Badger* (*fol.* 155).

A boarding officer, Lieutenant Edward McC. Titus, from the *Badger*, came on board the *Newfoundland*, examined her papers, and endorsed on the register of the *Newfoundland* his certificate that he found "her papers to be in accordance with the requirements" (*Transcript, fol.* 154).

Captain Malcolm, of the *Newfoundland*, "asked Lieutenant Titus about the blockade in Cuba," and was told by that officer that "the whole island of Cuba was blockaded. * * * It was blockaded from one end to the other" (*Transcript, fols.* 47, 155, 62, 229).

Before leaving he "asked Lieutenant Titus if there was any danger in his going westward," and was told "there was no danger whatsoever" (*Transcript, fol.* 156).

The master was under the conviction that under his instructions he ought to pass the ports of Caybairien and Sagua (as he said) "to satisfy my charterers that these ports were blockaded" (*fol.* 183), and "I naturally wanted to pass those ports according to my instructions" (*fols.* 51, 183).

Fearing he might create suspicion if, after having been previously running on a west course and after having been stopped by the *Badger*, he should, when released, change his course to the eastward (*fol.* 182), the master of the *Newfoundland*, after leaving the *Badger*, proceeded on his previous course westwardly through the Old Bahama channel (*fol.* 51). He accepted the statements of Lieutenant Titus that all the ports of Cuba were blockaded, and passed Caybairien and passed Sagua la Grande, but did not attempt to enter, although he saw no blockading ships near either of those ports (*fols.* 157, 158). Had he not been diverted

from his course by the false information of Lieutenant Titus he could lawfully have entered the port of Caybairien, discharged his cargo, and fulfilled the instructions of the owners (*fol.* 252). After leaving the *Badger* he considered that his destination was Kingston, Jamaica (*fols.* 43, 45, 50, 52, 151, 182, 183).

At 11 o'clock on the morning of the 19th, at a point in the Old Bahama channel, some 12 miles west of Sagua, he met and was boarded by the United States steamship *Hudson*, another of the blockading squadron, and his papers were again examined (*Transcript, fol.* 159).

After leaving the *Hudson* the *Newfoundland* continued on her west course, and at 6.10 p. m. on July 19 she was stopped and boarded by the United States ship of war *Tecumseh*. According to the calculations of Captain Malcolm, of the *Newfoundland*, the steamship was then 14 miles off the nearest land of the coast of Cuba (*Transcript, fols.* 152, 161, 162, 207). He was advised by the boarding officer of the *Tecumseh* not to go any nearer to the land, and he was told by the executive officer of the *Tecumseh* that there were about 30 blockading ships to the westward of their position; also "if he wished to avoid further trouble with the blockading fleet to keep to the north and west" (*fol.* 146).

He parted from the *Tecumseh*, according to his statement, at 6.30 p. m. (*fols.* 163, 148, 178).

He hauled the ship off one point north of west and steered on that course until 8 o'clock, when, calculating "that he was far enough off," he resumed his west course (*fols.* 218, 219).

At 8.30 p. m. he passed Havana light bearing south, and according to his estimate he was then 17½ miles north of it (*fol.* 164).

He continued his west course until 10.10 p. m., and was still heading west when he was stopped and captured by the United States ship of war *Mayflower*—Commander M. R. S. Mackenzie—at a point, according to the master's testimony,

21 miles; according to Commander Mackenzie's estimate, about 17½ miles, or "perhaps the difference between 17½ and 21," say 19¼ miles, north-northwest half west from Havana light (*fol.* 115). A prize crew was put on board of the *Newfoundland*, and she was taken into the port of Charleston, and there arrested and libeled as prize of war (*Transcript, fol.* 1).

In the original libel it was alleged that the *Newfoundland* was captured "in attempting to violate the blockade which had been proclaimed by the President of the United States to exist at the port of Havana."

Answers were filed on the part of the ship and on the part of owners of the cargo, denying the allegation of the libel, and issue was thus joined (*fols.* 5–10).

After a hearing on the testimony taken *in preparatorio*, the district court found and declared as follows:

"Taking the testimony which alone is now before the court, there is nothing in it which shows, or tends to show, that the *Newfoundland*, at the time of capture, or any other time was heading for the port of Havana, or any other port" (*fol.* 21), and "so far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts, as is presented in this record" (*fol.* 23).

The master of the *Newfoundland*, in his answers to the standing interrogatories, had sworn that when captured the *Newfoundland* "was steering her course towards Kingston;" that her course was never altered with the intention of going to or entering any other port at any time. All the witnesses from the ship swore that from 6.30 p. m. to 8 p. m. the course was one point north of west, and that from 8 o'clock p. m. until 10 o'clock p. m., when she was captured, the course of the *Newfoundland* was always west.

The court, in its "opinion," said:

"It also appears that Commander Mackenzie thought the movement and conduct of the *Newfoundland* on the night of the capture suspicious. The court has personal acquaint-

ance with Commander Mackenzie, and knows that in character, intelligence, and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof."

The court, however, added:

"It furnishes ground for ordering further evidence" (*fol.* 24).

Accordingly, the United States district attorney was allowed to amend his libel by striking out the words above quoted, and the district court, on August 15, 1898, entered a decree and "opinion" refusing to condemn or release the ship and an order granting leave to either party to take further proof (*fol.* 12).

To this decree, opinion, and order claimants filed exceptions (*fols.* 28–34). The amended libel was filed August 17, 1898 (*fol.* 26), and answers thereto were filed on the part of the ship and of the cargo August 19, 1898 (*fols.* 34 and 37).

The cause was heard upon pleadings and proofs at Charleston, South Carolina, in the United States district court for South Carolina, August 30, 1898, and days following, before Hon. Wm. H. Brawley, United States district judge, who, on 12th September, 1898, filed his "*opinion*" (*fols.* 239 *et seq.*). On 13th September a "*judgment*" of condemnation and forfeiture was rendered against the steamship *Newfoundland* and her cargo as lawful prize of war, and an order for the sale thereof was entered in the district court (*fol.* 258).

Claimants entered their appeal to said judgment, decree, and order (*fol.* 260 to 265), which appeal was allowed by the district court (*fol.* 265), and claimants filed (*fol.* 271 to 275) the following assignments of error:

Assignment of Errors on Appeal.

1. The court below, the district court of the United States for the district of South Carolina, erred in not releasing the *Newfoundland* and her cargo, on the first hearing, upon the ship's papers and proofs *in preparatorio*, the district judge having, after full argument and consideration, found that there was no evidence before the court upon which the ship and cargo could be condemned, and that—

"Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the *Newfoundland*, at the time of capture or at any other time, was heading for the port of Havana or any other port."

2. The district judge erred in holding, upon the hearing *in preparatorio*, that Commander Mackenzie's opinion, that the movements and conduct of the *Newfoundland* on the night of the capture were suspicious, furnished "ground for ordering further evidence," Commander Mackenzie's opinion not being in evidence at that hearing and being in itself no legal ground for such order.

3. The district judge erred in his decree granting leave to plaintiff to amend its libel upon which the issue had been made and joined and the hearing had been had, and to make a new case upon new pleadings and new proof, there being no evidence before the court of any attempt to break the blockade.

4. The district judge erred in his decree of August 15, in allowing plaintiff to make further proof, the facts of the case, as found by the district court (opinion and decree, filed August 17), affording no legal foundation for doubt and affording no proof of any overt act to justify the condemnation of the ship.

5. The district judge erred in overruling the exceptions

of respondents to the decrees of August 15 and 17 and in trying the case on further proofs.

6. Upon the second hearing the district judge erred in admitting as evidence of facts the testimony of the officers of the *Mayflower* and *Tecumseh*, consisting of attempts to locate the positions of the steamship *Newfoundland* on the ocean in reference to Havana light, her position when she met the *Tecumseh*, and the positions of the *Newfoundland* and of the *Mayflower* at various times; also undertaking to locate on the chart those positions so attributed to the *Newfoundland*, to the *Tecumseh*, and to the *Mayflower*, and to give the latitude and the longitude, the witnesses having all declared that those positions were located without taking observations at the times and were merely approximate estimates, and such estimates being based on wholly incomplete and insufficient data of calculation, and not being legal proof.

7. The district judge erred in disregarding the uncontradicted and unimpeached testimony of the master of the *Newfoundland* which located the course of the ship during the voyage through the Old Bahama channel and to the point of capture and the successive positions of the ship on her westward course, her positions having been taken at the times stated by actual observation and located on the ship's chart by the ship's log and other sufficient data.

8. The district court erred in accepting as proof the estimates and opinions of the officers of the *Tecumseh* as to the time of her meeting and the time of her leaving the *Newfoundland* on the afternoon of 19th July, and basing his decree upon such estimates and opinions, without evidence of fact upon which such estimates and opinions were based, and against the otherwise uncontradicted evidence in the cause, and in disregarding the evidence which impeached the accuracy of such estimates and opinions.

9. The district court erred in finding, as a conclusion of fact, that the *Newfoundland* had "loitered" in passing the

port of Havana, such conclusion being based upon a theory of inference from assumed times, places, and rate of speed of the *Newfoundland*, none of which were or could be proved to be correct, and most of which differed from that shown by the unimpeached testimony in defense, and which assumptions, theory, and inferences were shown to be incorrect.

10. The district court erred in accepting the theory and inference of "loitering" as evidence in the cause, and as proof of an overt act, committed by the *Newfoundland* in violation of the blockade established by the United States Government of certain ports on the island of Cuba.

11. The district judge erred in holding that the ocean at a point 10 miles off from the shore at Havana and at the point of capture, a point 18 to 21 miles off from Havana, both points being outside of the cruising ground of the blockading fleet, was prohibited water, and that the *Newfoundland* had been seen or taken within blockade waters.

12. The district judge erred in holding that the marine trespass committed by the commanding officer of the *May flower* upon the property of neutrals, by seizing the ship *Newfoundland* and her cargo, was justified by the alleged suspicious circumstances in the case, there being no overt act proved and no fact established in proof to which suspicion of intention could legally be attached to make out a case for condemnation of ship and cargo as lawful prize of war.

13. The district judge erred in holding as a conclusion of fact that the *Newfoundland* was captured when she was so near Havana entrance as to compel the conclusion that her purpose beyond a doubt was to enter that port.

14. The district judge, after admitting that there was "no proof that the *Newfoundland* was seen to be heading for the port of Havana," and that the testimony as to her suggested loitering "falls very far short of the proof offered" in cases cited by the plaintiff, erred in holding that a steam vessel which in the night-time passes a port "near enough to see

signals from shore" (although none be proved to have been seen or made) "thereby lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade," and that "there is therein a necessary presumption of sinister motive," although the proof be that when captured she had passed the port and was 18 to 21 miles away from it, sailing on a westward course, and although the proof be that her fullest steaming capacity was not more than eight knots per hour.

15. The district judge erred in holding "that the *Newfoundland*, with full knowledge of the blockade at Havana, approached sufficiently near to that port on the night of July 19th to render it easy to elude the blockade, and tarried there sufficiently long to enable her to discover whether she could do so with safety," the proof of plaintiff being that the port of Havana was most thoroughly guarded by a strong blockading fleet; that the master of the *Newfoundland* had been told by the mate of the *Tecumseh* about six o'clock p. m. of the same day that there were 30 warships blockading that port; that the *Newfoundland* had never been nearer than ten miles from the Havana entrance, had never been nearer than two miles away from the outside lines of the blockading fleet, and when captured had passed Havana and was between 18 and 21 miles to the northwest of that port, sailing on a westward course away from the island of Cuba and in the waters of the gulf of Mexico, and there being no proof of her tarrying near to the port of Havana to sustain a legal conclusion of fact.

CHARLESTON, S. C., *September* 28, 1898.

THEODORE G. BARKER,
Proctor for Respondents, Appellants.

Point First.

The district court erred in not releasing the steamship *Newfoundland* and her cargo on the first hearing upon the ship's papers and proof *in preparatorio*, the district judge, after full argument and consideration, having found that there was no evidence before the court upon which the ship and cargo could be condemned, and that "taking the testimony now before the court there is nothing in it which shows or tends to show that the *Newfoundland*, at the time of capture or at any other time, was heading for the port of Havana or any other port."

The "judgment" and "opinion," filed August 15 and 17, 1898, was a judicial finding of fact on libel and answers upon testimony taken and argument heard upon all the issues. It constituted a solemn adjudication of the question raised of lawful prize of war, and the conclusion reached by the court upon the evidence entitled the claimants of the vessel and cargo, as matter of legal right, to a judgment of immediate restitution. According to the approved rules of admiralty courts, the adjudication decided the question of justifiable seizure and lawful prize, on the one hand, as against a marine trespass and seizure without probable cause, on the other, and it terminated the rightful jurisdiction of the court over the subject of capture by removing as *res judicata* the only legal ground for seizure and arrest.

The district judge at the hearing had ruled, with unquestionable accuracy, that a statement in writing, prepared by the capturing officer, Commander M. R. S. Mackenzie, expressing his suspicions, and pasted by him on the log book of the steamship *Newfoundland* on the night of July 19, at the time of the capture, and so brought before the prize commissioners and returned by them to the court as part of the proof *in preparatorio*, was not admissible as evidence and could not be considered at the "hearing upon ship's papers and preliminary proof," such statement being no part of the

ship's papers, and that as the author of the statement, if present, could not be heard to testify directly, so he could not by means of such statement so pasted on the log bring his testimony indirectly before the court at such hearing.

After so ruling the district judge, with grave inconsistency with his said adjudication and ruling, declared in his filed "opinion" as follows:

"It also appears that Commander Mackenzie thought the movements and conduct of the *Newfoundland* on the night of the capture suspicious."

And therefore the court ordered "further proof."

It is respectfully submitted that the district judge erred in so holding. It nowhere appeared in the legal evidence in the case what Commander Mackenzie thought, beyond what might be inferred in all cases from the bare fact of seizing and "sending in" as prize of war a vessel captured on the high seas. What a capturing officer thought as to the movements and conduct of the suspected vessel, we submit, is not evidence upon which a prize court could base its proper judicial action.

To admit such opinion or suspicion as evidence or as the sole basis of an order of a prize court against a claimant is to do away with the wholesome rule of international law and practice, which limits most carefully and scrupulously in all cases the proof at the first hearing to the ship's papers and testimony taken *in preparatorio* and takes that evidence as *conclusive*.

Besides this, the district court had expressly ruled out the statement, pasted on the log, of what Captain Mackenzie said and thought, as incompetent and not proper to be considered at the hearing on preparatory proofs, and the evidence that "Commander Mackenzie thought the movements and conduct of the *Newfoundland* on the night of the capture suspicious" was not before the court.

What legal ground, then, does the order of August 15, 1898, for "further proof" find to stand on?

It surely cannot be sustained on the knowledge of the presiding judge of what Commander Mackenzie thought, coming to the court, not through any legal evidence taken in the cause, but irregularly, through a statement of the capturing officer, improperly pasted on the ship's log, which had been ruled out as incompetent.

Nor can such order be sustained legally upon the "personal acquaintance" of the presiding judge with Commander Mackenzie, nor upon his estimate of that officer's merits.

Yet it appears, in the "opinion" filed August 17, 1898, as the sole ground for ordering further proof (*Transcript, fol.* 24), thus:

"The court has personal acquaintance with Captain Mackenzie and knows that in character, intelligence, and attainments, he is the peer of any officer in the navy; but highly as it values his opinion, it cannot accept it in lieu of proof."

But, the court added,

"It furnishes ground for ordering further evidence."

It was said by Sir William Scott in *The Glierktigheit*, 6 C. Rob., 58. N. (*a*):

"When the facts are positively denied and that denial cannot be invalidated by any adequate means of estimating the credit of the witnesses, there is no other way of proceeding but by laying out of the case all of this extraneous matter and by recurring to the original evidence. *The court cannot attach itself to personal considerations* and say this is the affidavit of such a *gentleman* and that of an *ordinary* person; it cannot decide on grounds so vague and unjudicial as those of mere rank and situation in life; those are grounds to which it is impossible for me to advert in any manner that can produce a conclusion."

For the exercise of the jurisdiction for such order for "*further proof*" the district judge cited as authority the language of the Chief Justice in the *Sir William Peel*, 5 Wall., 534:

"If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution opportunity is given by the court, either of its own accord, or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

Conceding that under certain circumstances the district court has the discretionary power to order further proof, we submit that the discretion so exercised must be *a legal discretion*, based upon legal grounds, and not a vague discretion, unsupported by legal evidence or resting merely upon extrinsic suggestions of suspicion.

The authority cited, if taken as the true expression of the rule, does not sustain the action of the district court. The language of the rule, as stated by Chief Justice Chase, is this:

"If upon this *evidence* the case is not sufficiently clear to warrant condemnation or restitution." * * *

There must then, to begin with, be "evidence" against the ship or cargo, and upon such evidence the case must be "*not sufficiently clear.*"

According to the explicit finding of the district court in the case of the *Newfoundland*, there was absolutely *no evidence* upon which condemnation could rest.

The finding of the district court is thus stated (*fol.* 21):

"Taking the testimony, which alone is now before the court, there is nothing in it which shows or tends to show that the *Newfoundland* at the time of capture or at any other time was heading for the port of Havana or any other port."

To the findings and conclusion of fact no exception on the part of the libellant was taken, and they stand on the record as *res judicata*.

It thus being not a case of insufficient evidence or of "evidence not sufficiently clear," but a case of total absence of evidence, restitution, as for an unjustifiable arrest, should have followed as a necessary, logical, and legal consequence.

Again, in such cases—that is, cases where there is some evidence, but that evidence is not sufficiently clear—"opportunity is given," says the Chief Justice. Given to whom? The cases show that it is primarily given to the claimant of the property, against whom the original evidence shows some ground for doubt or some matter requiring explanation.

No case can be found where, in absence of all evidence to condemn, opportunity has been given to *captors* to hunt up evidence or to make a case *de novo* against a claimant.

There must be a foundation laid in the original evidence to support the call for "further proof."

The Liverpool Packet, 1 Gall., 525.

"Further proof may be considered as that proof but for which the ship in question would be condemned on the evidence *in preparatorio* before the court in the first instance, and is primarily a privilege granted to claimants (except in cases of fraud on their part) to put the captured ship to the explanation of circumstances 'pregnant with suspicion.'"

Browne's Civ. & Ad. Law, vol. 12, pp. 452 & 453.

The district court, in this case, reversed the rule and, finding *no proof* against the *Newfoundland*, practically held that the ship and cargo would not be released if the captors could produce some proof against her, and it gave that privilege and opportunity of "further proof" to *the captors*, really to enable them to make a case.

Ch. J. MARSHALL:

"It is certainly a general rule in prize causes that the decision should be prompt, and should be made, unless *some good reason* for departing from it appears on the papers and testimony afforded by the captured vessel. * * * This rule should be *held sacred* in the whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. * * * But the captured vessel may be neutral and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not be increased by prolonging his detention *in hope that something may be discovered from some other source which may justify condemnation.*"

The George, 1 Wheaton, 408.

"The practice of the prize courts is to confine the first hearing of the cause to the papers found on board the ship and the preparatory examinations. If they acquit or condemn, there is in general an end of the cause; *if they present a case of doubt or difficulty*, further proof is admissible."

The Anne Green, 1 Gallis, 274.
The Sarah, S. C. Rob., 330.

STORY, J.:

"It is upon the ship's papers and the examination thus taken in preparatory, that the cause ought in the first instance to be heard in the district court, and, upon such hearing, *it is to judge* whether the cause *be of such a doubt as to require* further proof, and if so, whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order when it ought to be granted, or *allow it when it ought to be denied*, and the objection be taken by the party, and appear upon the record, the appellate court can administer the proper relief."

The Pizarro, 2 Wheaton, 227.
The Springbok, 5 Wall., 1.

STORY, J.:

"It is the established rule in courts of prize, that the evidence to acquit or condemn must in the first instance come

from the papers and crew of the captured ship. * * * It is exclusively upon these papers and the examinations taken *in preparatorio*, that the cause is to be heard in the district court. If from the whole evidence, the property clearly appear to be hostile or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions, or inconsistencies, it then becomes a case for further proof, which the court will direct or deny, *according to the rules which govern its legal discretion on this subject.*"

The Dos Hermanos, 2 Wheaton, 76.
The Pizarro, 2 Wheaton, 227.

SIR JOSEPH JEKYLL:

* * * "As it is said in *Rook's case*, 5 Rep., 99*b*, that discretion is a science, not to act arbitrarily according to men's wills and private affections, so the discretion which is executed here is to be governed by the rules of law and equity;" * * *

Cowper vs. Cowper, 2 P. Wm., 753.

"Discretion without rule ceases to be law and becomes a most dangerous and tremendous power. When applied to a court of justice it means a sound discretion guided by law; it must be governed by rule and not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular (*Rex vs. Wilkes*, 3 Burr, 2539).

Witman vs. Ely, 4 Sergt. & R., 265.

The Haabet, 6 C. Rob., 54, was the case of a Danish vessel taken near Dunkirk on a voyage from Frederickstadt to L'Orient and proceeded against for a breach of the blockade of that port. The master had stated in his depositions "that he was twelve English miles from Dunkirk when he first made land, that he had shaped his course for the channel and was steering for L'Orient at the time of capture."

"On this evidence Lawrence contended on the part of the claimant that it was a case of *immediate restitution*, and that there was nothing on the face of the transaction that could in any manner justify a demand for captor's expenses. * * *

"On the part of the captors, the King's advocate, in reply,

pressed strongly upon the court the hardships to which persons employed on the blockading service would feel themselves exposed if the vessel was to be released immediately upon the representation of the neutral master without affording the captors an opportunity of giving their statement of what passed at the time of capture, so far at least as to justify the seizure and to entitle them to their expenses."

But Sir William Scott said (italics ours):

"The first source of information to which the court usually resorts is the evidence of the persons on board the captured ship. Among the interrogatories addressed to them there are some on which the captors might be supposed to be equally qualified to supply information, the number of the crew, the place of capture, and many other circumstances which are included in the number of standing interrogatories are as much in the cognizance of the captors as of the other parties. *The general rule of law, notwithstanding, is, that on all points the evidence of the claimants alone shall be received in the first instance, and if no doubt arises upon that view of the case the court is bound by the general law, as well by the act of the British legislature, to take those points as fully demonstrated.* It is a possible thing indeed that the witnesses may be forsworn, and that much injustice may be done, as in all references to human testimony dangers of that kind may be encountered. Courts of justice must nevertheless proceed on general principles. * * * The rule by which this court has always been guided is, I believe, conformable to the general practice of all the nations of Europe which directs the evidence to be taken from the persons on board the captured ship. * * * *The rule, then, being to take the original evidence of the claimant as conclusive*, if not impeached, I feel myself bound to pronounce that the depositions in this particular case are as void of suspicion as any which the court is in the habit of perusing. The ship appears clearly to be the property of a merchant in Norway. * * * The master says to the third interrogatory 'that he was twelve miles from Dunkirk which bore S. SE., &c. * * * *' The mate and the other witness speak to the same effect. Then, what is there to be placed in opposition to this account? *Merely a suspicion* arising from the circumstance that Dun-

kirk happened to be the first land which the vessel had made. * * * Under the defect of all circumstances of suspicion *in the original evidence*, the court is called upon to admit the affidavits of the captors. * * * If I should accede to this demand the consequence would be that I must do it upon a uniform principle of admitting affidavits universally and in all cases though there be nothing to excite suspicion *in the original evidence* and though the language of all the witnesses is as precise as possible. I can come to no such conclusion. It would, I think, be productive of great mischief on all sides. It might throw into the way of captors a temptation to exceed their line of duty and the exact bounds of justice and of truth, and it could not fail to impose upon the court a most unpleasant difficulty in the exercise of judicial functions. For how could the court decide? Counter-affidavits must be introduced which would necessarily be contradictory. Which should the court believe? *Can it be maintained that the preference should be given to the captors*, and *that* in opposition to the general rule that the claimant shall not be condemned except on evidence coming out of his own mouth or arising on the clear circumstances of the transaction? If this rule is unsatisfactory to captors it is nevertheless that which the law prescribes. It is my duty to take care that the rules of law are observed and that the rights of war are not exceeded, and certainly in no cases more than in this particular branch of the law of nations which must in its nature operate with severe restraint upon neutral commerce."

In the case of the *Newfoundland* the master had sworn, on his examination *in preparatorio*, that he had not entered or attempted to enter any Cuban port; that he had not altered his course at any time with the intention of entering any such port; that when captured he had passed, on his westward course, the port of Havana, and was 21 miles to the N. N. W. $\frac{1}{2}$ W. from the light, heading west and bound for Kingston, Jamaica, and the district judge had found and adjudged that on the testimony "there was nothing which shows or tends to show that the *Newfoundland* at the time

of capture was heading for the port of Havana or any other port."

There was, then, no ground for "doubt." It was not a case "clouded with suspicions or inconsistencies" or "pregnant with suspicion." There was a total "defect of all circumstances of suspicion in the original evidence," and there was no excuse on any legal ground for the order for further proof or for refusing an order for immediate restitution of ship and cargo upon the first hearing. In the case of the *Madonna* (4 C. Rob., 169) there was "vehement suspicion" as to the cargo being enemy's property, and also on account of the spoliation of some papers. The property, however, was restored with demurrage and compensation (pp. 169, 170, 171, 175, 176, 182, 183).

"The evidence to acquit or condemn with or without costs or damages must, in the first instance, come *merely* from the ship. * * * If there do not appear from thence ground to condemn as enemy's property or contraband goods going to an enemy, *there must be an acquittal*, unless from the aforesaid evidence the property shall appear *so doubtful* that it is reasonable to go into further proof. * * *

"The degree of proof to be required depends upon the degree of suspicion and doubt that belongs to the case. In cases of *heavy suspicion* and *great importance* the court *may* order what is called 'plea and proof'—that is, instead of admitting affidavits and documents introduced by the claimants only each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or condemn the capture and to examine witnesses in support of the allegation." * * *

1 *Am. State Papers* (*For Rel.*), 494, *ff* (Opinion on the general principles of proceeding in prize courts, drawn up in the form of a letter to Mr. Jay, on the behalf and at the request of the United States Government, by Sir William Scott and Sir J. Nicol, in 1794).

3 *Wharton Internat'l L. Digest*, sec. 330, pp. 211, 212, 213.

In the case of the ship *Liverpool Packet* (1 Gallison's Rep., 525), STORY, J., said:

"It is well known that the prize court is studious to preserve simplicity in its proceedings and rarely admits the captors to the benefit of further proof, except in cases of *strong suspicion.*"

"§ 511. A peculiarity of prize proceedings is that the evidence upon which the case must be heard in the first instance and on which the property must be condemned or acquitted, must come entirely from the vessel taken, the papers on board the vessel and the testimony on oath of the master and other persons attached to the vessel and on board at the time of the capture. This peculiarity is of the very essence of the administration of prize law" (*Benedict's Admiralty*, p. 302).

Such being the law, appellants ask from this court a judgment reversing the decrees and orders of the lower court, and an order of restitution of the ship and cargo, with costs and damages as for a seizure without probable cause.

THE NEWFOUNDLAND AND CARGO WERE ENTITLED TO THEIR DAMAGES AND COSTS.

In the case of *The Olinde Rodrigues*, May 15, 1899 (*U. S. Reports*, vol. 174, p. 511), this court held as follows (on p. 539):

"The entire record considered, we are of opinion that restitution of the *Olinde Rodrigues* should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation and of all costs in the case, except the fees of counsel, should be imposed upon the ship."

But the restitution in that case, *without* damages, and with costs imposed upon the captured vessel, was after hearing upon "plea and proof," and was expressly based upon the unanimous judgment of the court—that *upon the evidence* there was *shown to be probable cause* for the capture. The court say (on p. 535):

"But on the other hand we are bound to say, that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed and the case disclosed does not commend the vessel to the favorable consideration of the court."

The court in the opinion say (the italics are ours):

"Probable cause exists *where there are circumstances sufficient to warrant suspicion*, though it may turn out that the facts are not sufficient to warrant condemnation * * * (p. 535). The vessel was boarded and warned by the *Yosemite* on July 5 and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, *yet she so shaped her course as to invite it* (p. 538).

"When the *New Orleans* succeeded the *Yosemite*, her commander was informed of the facts by his predecessor and knew that whatever the right the *Olinde Rodrigues* had to be in those waters she could not place herself so near as to be able to break the blockade with impunity. But when he sighted her *she was on a course to all appearance directly into that port, and steadily pursuing it.* And when he signalled, the *Olinde Rodrigues apparently did not obey*, but seemingly *persisted on her course*, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact when the gun was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal * * * The *disregard of her duty* to shun the port and not approach *was so flagrant* that the intention to break the blockade was to be presumed, though we do not hold that that was a presumption *de jure*" (p. 538).

If, in the case of the *Newfoundland*, the conclusions of the district court on the hearing, on the ship's papers and testimony *in preparatorio*, which were not excepted to by the captors, is to be accepted as a true report of the evidence, and if, as found by the district judge on said hearing,

"taking the testimony now before the court, there is nothing in it which shows or tends to show that the *Newfoundland* at the time of capture or at any other time was heading for the port of Havana or any other port," and if no overt act and no circumstance of suspicion was established in proof, as the record shows, then it was a case where there were *not* "circumstances sufficient to warrant suspicion," a case where there was *not* "probable cause," as it is defined by this court, for the capture of the *Newfoundland* and her cargo, and a case where the neutral innocent owners were entitled on preliminary hearing not only to restitution, but also to their full damages and costs.

"The ship and cargo should be restored with full damages and costs."

The Vriendschap (6 C. Rob., 38).

"Restitution must be restitution in original value."

The Der Mohr (3 C. Rob., 129).
The Same Case (4 C. Rob., 317).
The Lucy (3 C. Rob., 208).
The Concordia (2 C. Rob., 103).
The Peacock (4 C. Rob., 185).
The Anna (5 C. Rob, 383).

In the note (*The Concordia*, 2 C. Rob., 101) it is said:

"It is a reasonable and fair profit on the commodity that is due, reference being had to the original prices actually paid by the exporter and expenses which he has incurred."

In *The Haabet* (2 C. Rob., 183) the court said:

"As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to those terms."

See also 1 Gall., 318, and 1 Gall., 293.

According to precedents this is clearly a case for restitution with full damages.

See *The Wren* (6 Wallace, 582).

In this case the vessel had previously run the blockade at Galveston. One of the crew had heard she belonged to the Confederates. A Confederate agent at Havana had appointed the master to the charge of the vessel. The purser believed she was owned by a firm, one of whose members was a citizen of the Confederacy. The court decided that such proofs were of a loose character and such as did not rise to the dignity of evidence. Vessel restored.

The Watchful (6 Wallace, 93):

"The record as it stands shows that the vessel cleared for Hamburg when her destination was certainly Matamoras (Mexico); that her clearance was probably altered after she was at sea by writing over the word 'Hamburg' the word 'Matamoras;' that a false manifest was used, and the fact of the main cargo of 252 cases of arms being on board was carefully *concealed* from the officers of the customs at New York, from which port she sailed." * * *

"It is very clear that there is no case of prize made out by the evidence. The property, which was undoubtedly Wallis', was therefore not enemy property, nor is there any evidence of intention to break the blockade or to trade with the enemy. The case is so destitute of all the elements of prize that the present libel was properly dismissed."

See also—

The Flying Scud (6 Wall., 263).
The Sea Witch (6 Wall., 242).
The Dashing Wave (5 Wall., 176).
The Science (5 Wall., 178).
The Volant (5 Wall., 174).

Point Second.

Upon the second or final hearing the district judge erred in admitting as evidence of facts and in adopting as proof the testimony of the officers of the Mayflower and of the Tecumseh, consisting of attempts to locate the positions of the steamship Newfoundland on the ocean in reference to Havana light, her position when she met the Tecumseh, and the position of the Newfoundland and of the Mayflower at various times; also consisting of attempts to locate on the chart those positions so attributed to the Newfoundland, to the Tecumseh, and to the Mayflower, and to give the latitude and longitude, the witnesses having all declared that those positions were located without taking observations at the time and were merely "approximate estimates," and such estimates being based on wholly incomplete and insufficient data of calculation, and not being legal proof.

The testimony on "plea and proof," like that taken "*in preparatorio*," failed to disclose any *overt act* on the part of the ship of a hostile character, to which act "suspicious circumstances" could be attached, to make a case for condemnation.

In absence of all such evidence in the original, or "further proof," resort was had by the captors to a charge against the ship of having "loitered," between 5.35 and 8.20 p. m., July 19, on her journey past Havana, with the intention of entering that port, notwithstanding the fact that when captured, at 10.10 p. m., she had passed that port and was 21 miles N. N. W. $\frac{1}{2}$ W. from Havana light, steaming west, away from the island of Cuba, and in the waters of the Gulf of Mexico.

His honor, the district judge, allowed the captors to introduce a "tracing," composed by Lieutenant Culver, of the United States war ship *Mayflower*, on the day after the capture, from "approximate estimates" as to time and place,

made by officers of the United States ships of war *Tecumseh* and *Mayflower*, for the purpose of illustrating and supporting a theory of "loitering," suggested by Commander Mackenzie and based upon inferences, without a solitary fact being proved, from which inferences was deduced the suspicion of intention on the part of the master of the *Newfoundland* to enter Havana. This inferred-"loitering" *theory* was allowed the place of an "overt act" and was adopted by the district court as the basis of its judgment condemning the ship and cargo; thus (*fol.* 250):

"Taking the point of departure to be somewhere within the circle already described and the time of departure at 6.30 and the rate of speed at nearly 8 knots and following the courses described—west by north until 8 o'clock and then due west until 10 o'clock—and platting it upon the chart, I must consider that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the *Mayflower* as the point of capture at 10 o'clock, unless she had loitered somewhere upon her route."

And at folio 251 thus:

"My conclusion is that the *Newfoundland*, with full knowledge of the blockade at Havana, approached sufficiently near to that port on the night of July 19 to render it easy to elude the blockade, and tarried there sufficiently long to enable her to discover whether she could do so with safety, and this finding renders it necessary for her to show from all the circumstances preceding, accompanying or following, that act, that her presence there was innocent."

We deny that "loitering" can be correctly held to be an "overt act," or that it can be accepted as such "overt act" as international law requires shall be shown in justification of a capture. It is a charge which on its face is of so vague and uncertain a nature as to be incapable of reliable proof. The idea of "loitering" lacks the definiteness and positiveness which is the very essence of "overt act." It is far

more of the nature of a conclusion of law than of fact. How would "loitering" be proved or disproved? Of what act or acts does it consist? In the present case, the charge is based upon the assumption that international duty required the *Newfoundland* to pass Havana at her highest rate of speed capacity; that she did not perform this supposed duty, but consumed more time than she ought to have consumed in steaming over a given number of miles.

We know of no such international duty, nor do we know upon what principle a prize court would be able to determine how much time a neutral vessel sailing on a natural course on the highway of the ocean "*ought to consume*" in passing in front of a blockaded port.

We protest that such an issue should not have been allowed in evidence on trial.

The proof offered was, as might have been expected, wholly insufficient to sustain the charge.

The "Tracing" Prepared by Lieutenant Culver.

The tracing prepared by Lieutenant Culver, of the *Mayflower*, on July 20, which the captors were allowed to introduce, was made up from hearsay information and "approximate estimates" furnished to him on the day after the capture by officers of the *Tecumseh*, as to the respective positions supposed to have been held by the *Newfoundland* and *Tecumseh* before 6.30 p. m., July 19, combined with "approximate estimates" by officers of the *Mayflower*, made also on the day after the capture, of the respective positions ascribed to the *Newfoundland* and to the *Mayflower* at 8.20 and at 10 p. m. of the 19th. By this tracing it was attempted to be shown to the court that the *Newfoundland* had "loitered" off Havana between 6 and 8.20 p. m.

After the argument of the case the court requested the respective opposing parties to mark on the chart (which had been introduced in evidence on the trial on the examination

of Captain Malcolm and which showed the course and position of the steamship *Newfoundland* on her voyage from Halifax to the point of capture) the various positions mentioned in the testimony—that is, those of the *Newfoundland*, as testified to by the master, and those of the United States ship of war *Mayflower* and of the United States ship *Tecumseh*, and also of the *Newfoundland*, as located on the tracing prepared by Lieutenant Culver (*fol.* 238).

When the "tracing" was introduced counsel for claimants at once objected, protesting "that the testimony of the witnesses for the plaintiff who undertook to fix the position of the several vessels and to locate the same on the diagram or on the chart was incompetent and either hearsay or mere guesswork" (*fol.* 125).

The objection was overruled and the testimony admitted; to which proctor for respondents excepted (*fol.* 238).

The chart of Captain Malcolm was properly in evidence to show the positions of the *Newfoundland* on her voyage, because the positions there noted were testified to by him as positions ascertained by himself as navigator of his ship, by actual "observations" taken by him, an expert, according to known scientific, mathematical, or astronomical rules, noted by him at the times and entered from those notes on his chart. It was thus the official cotemporaneous record of the hourly movements of the *Newfoundland* up to the moment of her capture (*fols.* 153, 159, 160, 170, 172, 192). No exception was taken to its introduction in evidence.

On the other hand, the diagram or tracing and the positions noted on the "tracing" and afterwards on the chart are all testified to be from "estimates" made by officers of the *Tecumseh* and *Mayflower* "approximately" *after* the capture; and this is so notwithstanding the fact that Commander Mackenzie, in using the permission of the court to note on Captain Malcolm's chart the positions of the vessels, has repeatedly used the words "cotemporaneous memoranda."

The theory of Commander McKenzie, adopted by the district judge, assumed that the *Newfoundland*, on July 19, left the *Tecumseh* at 5.35 p. m., at a point assumed to be 10¾ miles from Havana light, and that she was supposed to have been sighted by the *Mayflower* at 8.20 p. m. at a point about north from Havana light 10 miles, the latter point being assumed to be distant from the former 12 miles. It was also assumed that the *Newfoundland's* rate of speed was eight miles an hour, and that between 5.35 and 8.20 she "ought to have" traversed 24 miles; that as she had only traveled 12 miles she *must* have "loitered" on her journey between those assumed points, and that if she did so "loiter" it *must* have been with the intent to enter Havana (*fol.* 93).

In answer to this *theory* the ship and cargo contended that the *Newfoundland* left the *Tecumseh* at 6.30 p. m., and, allowing time for getting under way, say about 6.40, that when she started she was then much farther from Morro than 10¾ miles; that at 8.20 she was 17 miles from Havana light, and that her rate of speed was 7⅓ and not 8 knots per hour. They deny that the *Newfoundland* at any time intended or attempted to enter Havana; deny that she "loitered" on her journey at any time, and they assert, that she made between 6.30 and 10 p. m. her average rate of speed throughout her voyage.

It will, we presume, be admitted that to establish such a theory in proof it was essential that "the point of departure" *from* which, and the place of arrival *to* which, the time consumed, and the distance run were to be calculated—should be fixed in evidence beyond a possibility of doubt. Instead of this essential accuracy in proof we find in the testimony only guesswork.

Lieutenant Evans, of the *Tecumseh*, who furnished the material for Lieutenant Culver's "tracing," said (*fol.* 141):

"Q. Can you give her position at the time of boarding?
"A. At the time of boarding, I *estimated* her position to be *about* latitude 23.15 north, longitude 82.13.

"Q. Look at that tracing and see whether you can trace her location on that tracing. (Hands paper to witness.)

"A. The location that is placed here inside of the large dotted circle is *approximately* the correct position of the vessel at the time of boarding.

"Q. In what part of the large circle?

"A. I *should say about* the center of the circle; it was within that circle. I would not place her position closer than three miles."

On cross-examination he said (*fol.* 143):

"Those calculations that were referred to on that chart as designating the probable position of the *Newfoundland* at the time you met her, were they taken by observation?

"A. They were not; they were *estimations.*"

A. R. Nickerson, executive officer of the *Tecumseh*, was also examined as to the positions noted on the tracing prepared by Lieutenant Culver the day after the capture. On cross-examination he said (*fol.* 148):

"Q. When was the latitude and longitude mentioned on that chart taken?

"A. The position was corrected *at noon* by cross-bearings.

"Q. That put down on the chart, is that taken by observation?

"A. No; from bearing in the tower.

"Q. That latitude and longitude?

"A. That latitude and longitude, the position at the time of overhauling, is *estimated—estimated from* 12 *o'clock aboard of our ship.*

"Q. If you are able to state the latitute and longitude why can't you state exactly her position, instead of stating it within 3 miles?

"A. You see we had run 4 or 4¼ miles, and a big heavy set of current from the Gulf Stream close in shore.

"Q. Running eastward from west?

"A. The current was running east; we were running northeast; the current was running to the eastward."

Now, this run of four or four and a half miles was from no certain or ascertained point in the ocean—"6 *or* 8 *miles*

from the light" (that is, Morro light) and "*about* 3½ to 4 miles from the nearest shore" is the witness' *estimate* of the position of the *Tecumseh* at the time she sighted the *Newfoundland* (*fol.* 14). Lieutenant Evans had testified that to be the "*usual* place" of the *Tecumseh*, and as to her movements (*fol.* 142):

"Q. Was that your usual place?

"A. At that time that was my usual position, *drifting with the current*, maintaining a position between the bearings that were prescribed.

"Q. What were those bearings?

"A. At that time, southwest by south, and southwest by west, Havana light between those bearings.

"Q. Were you under steam?

"A. Yes, at the time of sighting the light I was *probably drifting*, the engine not turning over, *or I might have been* steaming very slowly, just turning over."

The duty assigned to the *Tecumseh* was to cover by "drifting," or "steaming slowly," or steaming faster, as might be, a segment of a circle between those bearings—that is to say, to pass from a point from which Havana light would bear southwest by south to a point from which it would bear southwest by west and back again, covering five points of the compass (*fol.* 89), and to repeat that movement continuously during the 24 hours. The actual distance so traversed would be, of course, greater or less as the segment was greater or less according to her distance from Havana light, whether "*about* 6 or 8 miles," as stated by Evans (*fol.* 142), or "between 6 and 7 miles," as stated by Nickerson (*fol.* 147), or six miles, as put down on the tracing, and the record of her log as to the number of miles so run by her would be affected more or less by the unestimated force of "a big heavy set of current from the Gulf stream" described by Lieutenant Nickerson.

Then, in order to get at the *probable* position of the *Tecumseh* at 5.35 or at 6 o'clock, when she boarded the *New-*

foundland, the officer of the *Tecumseh*, who undertook to put down the latitude and longitude by "estimation" for the want of any "observation" made at or near that time, had to go back from 6 p. m. to "noontime" of that day and take the position which had been then taken, not by *observation of the sun*, but "by cross-bearings," and to calculate the *probable* number of miles traversed in passing to and fro within the segment of the circle, between the bearings above mentioned, added to the 4½ miles' run in going to the ship, in order to *approximately* estimate the degree of latitude and longitude which would *probably* represent the *Tecumseh's* position at 5.35 p. m., when she was said to have boarded the *Newfoundland*.

To make this calculation at all accurate it was essential that the actual courses and distances of the *Tecumseh* between noontime and 6 p. m., together with the proper allowance for current, should be known. No copy of the log of the *Tecumseh*, showing her courses and distances from noontime to 6 p. m., was produced, by which the accuracy of the calculation of the latitude and longitude at 5.35 o'clock, as *estimated* by Lieutenant Nickerson and as put down on Lieutenant Culver's "tracing" and afterwards on the chart, could be tested or proved. The copy of the log from 4 p. m. to 8 o'clock was put in evidence (*fol.* 144), and from it no record appears of the courses or distances of the ship. It must be assumed that the log from noontime until 4 o'clock was equally devoid of such record. It therefore appears that no data were kept from which even an "approximate estimation" of the latitude and longitude at 6 p. m. could have been made; certainly none were put in evidence by which the accuracy of those estimates could be tested by the court.

Thus, from a vague and uncertain starting point, varying, as "estimated," all the way from six to eight miles from Havana light, with no "observation" taken, with no log record to go by, and the *Tecumseh* traversing, between noontime

and 6 p. m., backwards and forwards between two points of the compass an uncertain number of times, going sometimes with and sometimes against "a big heavy set of current," with a varying rate of speed, and on her last run "going at full speed" on a northeast course across a current running east, with no record of the number of miles run by her between noontime and 5.35 p. m., the witnesses for the captors, on an indictment charging the *Newfoundland* with "loitering" between two assumed points on the ocean, undertook to fix, on the day after the capture, *by* "*estimation*," the exact latitude and longitude of "the point of departure" where she was boarded by the *Tecumseh;* and this *estimation* is set up before the court as *proof* to contradict the precise testimony of the master and crew and log and chart of the *Newfoundland*, showing the daily record of the positions and course of the *Newfoundland* put down by Captain Malcolm from actual observation and log reckonings, corrected from time to time by land bearings (*fols.* 160–170), the last sun observation having been taken by him at 4 p. m., two hours before meeting the *Tecumseh*, from which time and position to the time and place of meeting the *Newfoundland* was *proved* to have steamed, on a straight west course, an ascertained number of miles recorded by her log.

THE SAME UNCERTAINTY IS SHOWN AS TO THE TIME.

Lieutenant Evans, of the *Tecumseh*, said that the *time* when the *Newfoundland* was boarded was "*about*" 5 o'clock. This was taken from no note made by himself. He says (*fol.* 140):

"I remember it was *about* 5 o'clock, *because* as soon as we started after that vessel I went down below to get my dinner. I was *probably* down there 15 or 20 minutes, when it was reported to me that we were very near the vessel. * * * Q. You say, then, it was about 5 o'clock when you started in chase, and you were 25 minutes to half an hour before

boarding? A. I *should say* that was the time. Q. How long was she detained by you? A. I *should say* half an hour."

He also said (*fol.* 143) that the time was recorded in the official log of the ship. The extract of the log, however (*fol.* 144), reads thus:

"At *5.15* sighted stray steamer to the eastward; stood over to her. She proved to be the *Newfoundland*, of Montreal. From board bearing at 5.35 she proved to be bound from Halifax for Vera Cruz and Kingston, Jamaica, with general cargo. * * *"

It would seem, from this not very clear entry, that the ship was sighted at 5.15 and not at 5, as said by Lieutenant Evans. If it took "a half hour" to come up with her, it would bring it to 5.45 before the *Tecumseh* got "very near" the vessel, and about 6 o'clock, we may assume, before she was actually boarded. She was detained, according to Lieutenant Evans, "about half an hour," bringing the time to about 6.30 before she left the *Tecumseh*, which very nearly agrees with the testimony of the master (*fols.* 163–173), of the mate (*fols.* 203, 204), of the engineer (*fol.* 222), of the ship's log, and of the engineer's log, of the *Newfoundland*. The engineer's log showed (*fol.* 222) that by that ship's time the *Newfoundland's* engines stopped at 6.10 p. m., and that they were started again at 6.30 p. m. In the face of this evidence, the "tracing" of Lieutenant Culver and the testimony of Commander Mackenzie charge the *Newfoundland* with starting at 5.30 p. m., an error of about *one hour* in the calculation upon which the theory of "loitering" rests.

The evidence of Lieutenant Nickerson as to the *time* the *Tecumseh* started for the *Newfoundland* differs from Lieutenant Evans, but agrees with the log. He says (*fol.* 146):

"The vessel was sighted northward and eastward; at 5.15 we started chasing her."

He then becomes very positive, saying. "We boarded her at 5.35 exactly, returned on board our ship at 5 50, was absent from our ship a little better than 10 minutes, not more." He does not say that he took cotemporaneously any notes or kept any memorandum of those fractions of time to warrant his positiveness of statement. His recollections cannot stand alongside of *the proof* from the log of the engineer of the *Newfoundland*, which recorded cotemporaneously in the engine-room *exactly* when his engine stopped (at 6.10) and the instant when it again moved (at 6.30) (*fols.* 222, 223).

Commander Mackenzie was willing to allow one half hour for a possible difference between the time kept on the vessels (*fol.* 93). He said as to the tracing:

"Q. The first and final positions, are they correct?

"A. Yes; very nearly, judging from the position of the light, and the Morro was lighted that night. The principal point that governed me was *from half past five*, when boarded by the *Tecumseh*; they had it at six o'clock. Probably it was a difference of the time of the two vessels. From half past five till we saw her at half past eight she ought to have run 24 miles."

This idea rests on the assumption that the *Newfoundland* started at 5.30, whereas the record of the ship showed that her engines started at 6.30, and some allowance is to be made for her getting well under way after her engines actually began to move. Other testimony also corroborates the record of the *Newfoundland* as to the time she left the *Tecumseh*.

The sun set on the 19th of July at Havana, by the almanac, 6 hours and 37 minutes (*fol.* 178). All the witnesses agree that there was very little twilight.

Lieutenant Nickerson of the *Tecumseh* testified (*fol.* 148):

"Q. Did you see her after you left the *Tecumseh* (meaning the *Newfoundland*)?

"A. For, I suppose, about 10 minutes.

"Q. That is, she was only visible to you for that time?
"A. It began to settle down dusk then."

This showed that it was 6.30 p. m. or even later when the *Tecumseh* allowed the *Newfoundland* to start ahead, and not 5.35, as at first alleged by this officer.

The district judge in his opinion admits (*fol.* 247):

"I am not so clear as to the time, * * * but giving the ship the benefit of the reasonable doubt which the evidence warrants, assuming that she sailed at 6.30," &c. * * *

The purpose of this "tracing," prepared by Lieutenant Culver, by order of Commander Mackenzie, on July 20, the day *after* the capture, after consultation between the officers of the two blockading vessels, and made up of "approximate estimates" by those officers, was, as we have said, to sustain the *theory* of Commander Mackenzie, based upon the assumed position of the *Newfoundland* at 5.35 p. m. and her estimated and assumed position at 8.30 p. m. and the assumed rate of speed of the vessel going on a straight line between those assumed positions, from which hypotheses the inference was attempted to be drawn that the *Newfoundland* consumed more time in passing between those assumed points than ought to have been consumed, and from that inference the conclusion is attempted to be forced that she was "loitering" off Havana with the intention of breaking the blockade (*fol.* 93).

This word "loitering" was invented by Commander Mackenzie, and, like his word "chase," involves a prejudgment of the whole case against the *Newfoundland* and of the questions: *First.* "Was the assumed starting point or 'point of departure' accurately stated and was it proved as to the time and the place?" *Second.* "Was the assumed position at 8.20 or 8.30 correctly stated and proved?" *Third.* "Was the assumed rate of speed of the ship her normal rate or the actual rate of speed at which she had been previously

speeding?" *Fourth.* "Had she slackened that speed between 6.30 or 6.40 p. m. (when the *Tecumseh* lost sight of her, going 'on a course northward to westward'), and 8.20 p. m. (when she was supposed to have been sighted by the *Mayflower*)?" *Fifth.* "Assuming that she did slacken her speed between the assumed point of starting and the assumed position at 8.20 p. m., was it a necessary or reasonable inference from such supposed slackening of speed that she did so with the intention of making an attempt to enter the port of Havana?"

(1.) We have shown that the naval officers' location of the point of departure—that is, the position—of the *Newfoundland* when she met the *Tecumseh* rests on no solid basis of proof, is wholly uncertain, and is based on admittedly "approximate estimation," without the assurance of accuracy from "observation;" that it contradicts the record of the *Newfoundland*, and that the "point of departure" assumed by the district judge in his decree was not proved as alleged.

(2.) Was the Assumed Position of the Newfoundland at 8.20 Proved?

There is absolutely no *proof* to justify the location of the ship's position at 8.20 p. m. at the point assigned her on Lieutenant Culver's tracing. It all rests upon surmise and upon the assumption that "a faint light," which was seen by the officers of the *Mayflower* at 8.20 or 8.30 p. m., about north from Havana light, was the light of the *Newfoundland*.

This conclusion is based upon the assumption that because the *Mayflower* started towards *a* light at 8.20 p. m., seen about northeast from Havana, and because she came up with the *Newfoundland* at 10 p. m. at a point N. N. W. ½ W., about 17 or 19 miles from Havana light, that therefore the "faint light" seen at 8.20 must have been the light of the

Newfoundland, and could have been the light of no other vessel.

We submit that this is not *proof*, and is no proper warrant for the assertions of the officers of the *Mayflower* undertaking to locate the true position of the *Newfoundland* at that hour. There is not, and, from the nature of the case, there could not be, any *proof* coming from those officers of the actual position of the *Newfoundland* at that point of time or place.

It was night-time; it was dark; the vessel herself was not and could not be seen, nor was she nor could she be seen so as to be known by them to be the *Newfoundland* (*fol.* 107).

All the evidence on this point from the captors is mere surmise. "*About*" 8.20 p. m., the *Mayflower* being, as is assumed (not proved), "*about* six miles" north by east from Morro light (*fol.* 247) and on her cruising ground, in motion "at half speed," "heading east-northeast," a "faint light" was seen bearing *about* north by west from the *Mayflower*, and *estimated* to be *about* two or three miles distant (*fols.* 133, 244).

In his testimony, Commander Mackenzie stated that the blockading officers and crew were in the habit of seeing many vessels in that locality and of chasing them (*fol.* 116).

"As to chasing, we chase all the time—two or three newspaper tugs at night; spent over half a ton of coal chasing newspaper tugs, and we don't get anything."

There is nothing in proof to show that the "faint light," so discovered by Ensign Pratt from the *Mayflower*, may not have been the light from some "newspaper tug" or from some vessel other than the *Newfoundland*. Certainly there is no evidence upon which it can be averred, as proved, that the "faint light" so seen was in fact a light on the *Newfoundland*.

It is surmised, conjectured, assumed, merely "from sub-

sequent developments" (*fol.* 244) that it was the *Newfoundland's* light and none other.

These "subsequent developments" have been described in the testimony of the officers of the *Mayflower*, and in the "opinion" of the district judge, as a "*chase*," a word invented by Commander Mackenzie—a small one, indeed, but one of immense dramatic power in prejudging the whole case against the *Newfoundland*.

The word "chase" as used by the witnesses and by the district judge involves *these* assumptions, without proof, viz:

(*a.*) That the faint light so seen was the *Newfoundland*.

(*b.*) That though it appeared and was lost soon after, and though no light was visible for some length of time, whenever another light was seen anywhere upon the ocean, the second light was assumed to be necessarily the same as the first, and to belong to the *Newfoundland* and to no other possible ship or tug.

(*c.*) That though between 8.20 p. m. and 10.10 p. m. the *Mayflower* was frequently seeing lights, now off her starboard and now off her port bow, at various points of the compass, and though in the intervals she sometimes for a great length of time saw no lights at all, yet in every case it was assumed that the light that was seen was that of the *Newfoundland*, and of no other possible ship or tug.

(*d.*) That the *Newfoundland* was "the chase"—that is to say, the thing which was being chased, and which *knew* that she was being chased by the *Mayflower*—notwithstanding it was admitted by Commander Mackenzie that *at no time could the Newfoundland have seen the Mayflower*, as the latter carried no light, and did so intentionally, so as not to be seen (*fol.* 109).

Upon the bare fact, then, that at 8.20 p. m. "a faint light" was seen about north by west from the *Mayflower*, and

that she from her position, "about 6 miles" northeast from Havana light, steamed in the direction in which that light was seen, and that the *Mayflower*, after running an unascertained and unrecorded number of miles, frequently changing and altering her course between 8.20 and 10 p. m., at the latter hour came upon the *Newfoundland*, it was assumed that the "faint light" seen at 8.20 p. m. was the light of the *Newfoundland* and of no other ship.

It was also assumed that every light which was seen by the *Mayflower* during the hour and a half from 8.20 to 10.10 p. m. on the various courses run by her between her starting point, near Havana entrance, at 8.20, and the point when she came upon the *Newfoundland*, 19¼ or 21 miles N. N. W. ½ W. from Havana light, at 10 p. m., was always and necessarily the light of the *Newfoundland*, the ship herself not being seen until a few minutes before the seizure.

It was also assumed that in this so-called "chase" of the *Newfoundland* by the *Mayflower*, at every time that a light was seen and at every time when a light so seen disappeared, the *Newfoundland*, called "the chase," was changing her course, conscious of being pursued, and was turning and dodging about, in guilty consciousness, in order to escape her pursuer.

It was upon this assumption mainly that the *Newfoundland* was seized as "prize of war" (*fols.* 20, 41, 90, 96, 109).

And yet Commander Mackenzie, when he encountered Captain Malcolm, master of the *Newfoundland*, 21 miles N. N. W. from Havana light, so far from finding a man conscious of guilt, who had been knowingly running in a zigzag course, doubling and turning to escape a recognized pursuer, found him wholly unconscious of any pursuit, steaming on a straight course west (as all the witnesses on the ship and the ship's log and chart proved that she had been steering since 8 o'clock p. m.) (*fols.* 163, 203, 205, 215, 219, 245).

The boarding officer of the *Mayflower*, Lieutenant Culver,

who went on the deck of the *Newfoundland*, testified as follows (*fol.* 120):

"I said to the captain first thing, 'We have been chasing you a long time.' He said, 'That is strange; he hadn't seen us until we fired the gun.'"

Commander Mackenzie testified:

"I thought Captain Malcolm seemed to be perfectly straightforward, but rather contradictory." * * * (*Fol.* 92.)

Captain MALCOLM tells of his interview with Commander Mackenzie on board of the *Mayflower* when he was arrested:

"When I went on board the *Mayflower*, after being introduced to Captain Mackenzie, he told me he was going to send me in. I asked for (what). He invited me down in his cabin and he told me I had been changing my course. I told him I had not changed my course since 8 o'clock. He said, A very strange thing; he couldn't account for it, if I was not changing my course. He then asked me the speed of the ship, and I told him 8 knots, when he said, I don't believe you; we have been chasing you now for nearly two hours, and my ship is going all the way from 11 to 16 knots, and he said, 'It was not possible unless you are making more than 8 knots.' I told him he could not have been steering a straight course if he had been chasing us that time at that speed. He said it was very hard for him to believe; he should say the ship was nearer 18 than 8. I told him that was simply an impossibility" (*fol.* 176).

Cammander Mackenzie and his officers, assuming that every such successive light seen from the *Mayflower* between 8.20 and 10 o'clock p. m. was that of the *Newfoundland*, fell into the still greater error of also assuming that the vessel which they were pursuing was frequently changing her course, and doing so to escape capture, because, forsooth, the lights they saw appeared now on one side and then on the opposite side, now appearing and then disappearing; at one time disappearing for twenty and at another for thirty

minutes, and, as he put it, "only occasionally visible" (*fols.* 20, 90, 96, 109).

And *yet* Commander Mackenzie was forced, on cross-examination, to admit that, assuming that the "faint light" which he saw at 8.20 p. m. was the light of the *Newfoundland*, it was possible that *she* might all the while have been steering a straight course, while the *Mayflower*, "*the pursuer*," in following her, might have done all the changing of course that was done (*fols.* 110, 112):

"Q. I want to get from you really the statement of what your view of this matter will be, and I tell you frankly I want to get you to admit (that) the apparent changing of her course to you may have been an effect consistent with her going on an absolutely straight westerly course, while you followed first on one side and then on the other?

"A. I admit that maybe she didn't change her course; it is possible but not probable that we would overrun her course.

"Q. You were overrunning the light on the port side?

"A. We never saw her port light.

"Q. Suppose the companionway of a ship with an opening on the port and starboard sides, and a lantern hanging in the companionway, the light from which would be visible at certain points through each of these openings, she going now on a westerly course, and having passed a point two points abaft the beam, where you would lose the sight of the light, if you saw it before, it would not be possible for her in her position relative to your position to open to your vessel the lantern showing through the port opening of the companionway?

"A. Oh, yes; I have not seen the companionway. * * *

"Q. I am giving you a hypothetical case. Assuming there is a companionway and a lantern hanging in it, and there is on the port side an opening through which the light would be visible at a certain angle, and another on the starboard side, through which it would also be visible, and the vessel going west and you following the light—the light from the companionway—you would bear towards that light as it retired, and in doing that wouldn't it be possible for you to overrun that course, and open the light through the starboard side?

"A. Yes.

"Q. Assuming you got in that position you would change your course and bear down a little beyond where you saw that light; she going still west, it was possible for you to overrun that again and open the light on the port side; then you would bear down again on the direction you had last seen the port light to overtake it?

"A. Yes; that diagram will show; that is quite possible, but you cannot reconcile it with steering a west course.

"Q. I ask you if that, assuming she held a west course——

"A. Not with a west course, we pursuing her; as we pursued her, it might happen we would see the light first on one beam and then on another. It couldn't happen, she being 10 miles north of Morro and steering west and coming to 17½ miles on the bearings she had given there.

"Q. Leaving the Morro out—taking the vessel in mid-ocean, pursuing a straight course—a vessel seeing a light on her, found her due north, steering, as soon as she saw her, a northwesterly course, that vessel going on, concealing that light by going on, the moment it came two points abaft the beam, would you lose that light, if the light was on the port side of the companionway? Wouldn't it be possible to disclose that light on the starboard side?

"A. Yes; I have said that several times. If you will look at the diagram you will see that it will be possible.

"Q. I am going to ask Captain Mackenzie to testify that this losing and gaining of these lights is possible to happen with a vessel going a straight course in front of one pursuing.

"A. Yes; and I drew the thing out the next day when I had leisure, and I came to the conclusion that it was possible for her to be steering a straight course.

"Q. So instead of her doubling and turning, it was your vessel that was doubling and turning?

"A. Yes; I don't say it was, but it may have been so" (*fol.* 110, 112).

Now, the slip pasted on the log of the *Newfoundland* by Commander Mackenzie at the time of capture (*fol.* 20) states thus:

"The *Mayflower* then being about 8 miles north of Morro light, Havana, started in chase of a faint light to the northward which was only occasionally visible. The chase oc-

casionally changed course two or three times and was finally brought to about 10.30 p. m. about 17 miles north-northwest of the Morro." * * *

It was mainly, as we have said, upon the assumption that the "faint light" seen from the *Mayflower* at 8.20 p. m. was the *Newfoundland;* that the latter was conscious that she was pursued, and that conscious of guilt she had frequently changed her course, doubling and turning in the effort to escape, that the commander of the *Mayflower* took upon himself the responsibility of seizing the *Newfoundland* and of sending her in as prize of war.

The admissions of Commander Mackenzie, above quoted, show that this assumption was unfounded and unjustifiable, and yet the same assumption pervades the "opinion" of the district court throughout. The court said (*fol.* 243):

"Ensign Pratt of the *Mayflower* * * * testifies that about 8.20 he picked a small light bearing northwest from him; * * * shortly after heading for it, *the light* was lost, but standing on the same course about 20 minutes and putting on forced draught, *the light* was *picked up again* a little to the westward. Altering his course and heading north-northwest, *the light* shortly disappeared *again*. He gradually changed his course to the westward until he headed about northwest, standing on that course about 30 minutes, still not seeing *the light*, when about 9.10 he sighted *it again*, bearing southwest on his port beam and inshore; headed for *it again* and stood on until about 9.30 when *the light* was seen outshore of him on his starboard beam, and headed for *it* again, and *came up with her* at 10 o'clock. *From subsequent developments it is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland visible only when nearly abeam through the doors on either side.*" * * *

Again, says the decree:

"When *the light* was first seen the *Mayflower* was heading east-northeast and *the light* was bearing north by west from her, a point forward of the port beam and estimated two or

three miles distant. No *other* light was *seen on the Newfoundland* until she was overhauled. At that time all of the regulation lights were found to be burning brightly" (*fols.* 243, 244).

Again:

"Lieutenant Culver, navigating officer of the *Mayflower*, *describes the chase* substantially as above, and exhibits a tracing, made on July 20, showing the *estimated positions of the respective vessels* at the time when *the light* was first discovered, and at the time of the capture, *and the course sailed by each.*"

Again, says the decree:

"Commander Mackenzie, of the *Mayflower*, was the senior officer of the blockade off Havana. * * * He says that about 8.30 a faint light was reported about north by west of him, which he thought was a plain lantern. *He describes the chase* and *locates* the *positions* of *the two vessels* on the tracing prepared by Lieutenant Culver."

We submit that a judgment based upon such testimony is without evidence to support it; that a "tracing" based upon such assumptions and mere inference without proof was not evidence and should not have been considered by the district court, and that the theory, assumptions, and suspicions of Commander Mackenzie were not proof and were not evidence upon which a decree of condemnation can be supported.

(3.) Was the Assumed Rate of Speed of the "Newfoundland" Her Actual Rate?

In the theory of Commander Mackenzie, adopted by the district court decree, the assumed rate of speed of the *Newfoundland* was 8 miles per hour. It was *proved* by Captain Malcolm, from his ship's log and engineer's log and from his own record put down upon his chart (*fol.* 190), that her average rate of speed during her voyage was about 7½ miles,

and that in coming from Crooked Island through the old Bahama and Nicholas channels he had not exceeded an average of $7\frac{1}{3}$ miles per hour (*fol.* 169).

Against this proof no evidence whatever was offered to contradict it or to sustain the assumption upon which the theory of "loitering" rests.

On the other hand, the log of the *Newfoundland* and the record of Captain Malcolm showed the actual distance run, by the log through each day of the ship's course, as well as the courses and the successive positions of the *Newfoundland*, from actual sun or star observations corrected by land bearings, taken from time to time. From the position of the ship at 4 p. m. and at 6 p. m., and the course from 6.30 p. m., one point north of west until 8 and after 8 due west, the straight courses run by the *Newfoundland* at the proved average rate of her previous speed, $7\frac{1}{2}$ knots, brought the ship's position at 10.05 p. m. *exactly where* Captain Malcolm at that hour located her by observation of the dip of Havana light, viz., 21 miles north-northwest one-half west from that light.

That was the position given by him in his testimony *in preparatorio* before the question, made on the second hearing, was raised, and it coincided with the record of the ship's courses and distances and positions previously noted by him in his memorandum book and afterwards put down in his chart (*fol.* 190). His record of the ship's voyage enabled him also to give the average rate of speed at which the ship had actually run *prior* to meeting with the *Tecumseh*, and he proved that between 6.30 p. m., when the engineer's log and the ship's log and the master's record showed that he left the *Tecumseh*, he ran at the *same* rate of speed to 8 o'clock and to 8.30, and to 10.05 p. m., when he was stopped by the *Mayflower*, covering just the distance shown on her chart, viz., that from 6.30 to 10.05 p. m., going at a speed of about $7\frac{3}{4}$ knots an hour, he had traversed $27\frac{1}{2}$ miles (*fol.* 173).

"Q. Did you or not increase your speed between the time you met the *Tecumseh* and the time you were stopped by the *Mayflower?*

"A. No.

"Q. What speed was that, from your calculations subsequently made?

"A. It was 7 knots—nearly 7 knots—calculating the time we were stopped by the *Tecumseh*, 20 minutes, which would give her a speed of a little over 7½ knots on an average."

This average corresponded with the previous average rate of speed of the *Newfoundland* before she met the *Tecumseh*, as it is recorded on her log and on the master's chart (*fol.* 169).

"Q. What is your ordinary rate of speed? I don't mean on this particular voyage—the ordinary rate of speed on this ship?

"A. It has been since I have been on the ship 7 to 8 knots.

"Q. Then the average rate of speed at which you had been running before you met the *Mayflower?*

"A. I had been running about 7½.

"Q. From Crooked Island channel to the *Mayflower?*

"A. No; I didn't make that much.

"Q. Have you calculated the average you did make from your chart, locating her *per diem* course of the ship?

"A. About 7¼ knots average rate of speed maintained from Crooked Island channel until I met the *Mayflower.*

"Q. If you were to push the ship to or above 8 knots an hour what would be the natural effect?

"A. She would consume a lot more coal; it would be hard on the machinery, and when the ship was loaded it would only be safe to do that in the very smoothest of waters.

"Q. Were you very flush of coal at that time?

"A. No; the coal was getting short at that time.

"Q. Before that time had you given any instructions to the engineer with regard to your rate of speed?

"A. I had.

"Q. What were they?

"A. I told him to reduce the speed and save the coal.

"Q. How is your calculation made to the run of the ship in point of miles every 24 hours?

"A. Ordinarily get the distance from the log corrected by observations.

"Q. What kind of observations?

"A. Sun observations or star observations.

"Q. If you were in sight of land could you correct it in that way?

"A. Yes; correct it by land if in sight of the coast.

"Q. Which of those ways of ascertaining the position and course of the ship did you use in making your record upon those charts?

"A. I invariably used observations when I could get them—when the sun was not obscured. I would take the sight every morning at 8; I would take the meridian altitude at 12, and another chronometer sight about 4 in the afternoon, with occasionally a star or two at night.

"Q. And land observations in the day?

"A. When I was in sight of land I would take the bearings of the light-house or a well-known point of land to correct my position by."

(4.) Had the "Newfoundland" Slackened Her Speed Between 6.30 and 8.30 p. m.?

There is no testimony whatever produced on this point by the captors. The testimony of the master of the *Newfoundland* was that he maintained the previous average speed of his ship between the time, 6 30, when he left the *Tecumseh*, and 10.10 p. m., when he was captured by the *Mayflower*, and that he did not at any time increase his rate of speed, which, of course, he must have done to make up his average, if at any time he had slackened his speed in order to "loiter."

The engineer of the *Newfoundland* testified (*fol.* 221) as follows:

"Q. From the position of the engineer in a steamship, do you at any time know of your own knowledge, from the running of the engine, the actual speed the ship is making?

"A. No.

"Q. Does the record you keep in your office show?
"A. Merely the number of revolutions of the engine.
"Q. What is the fullest capacity in revolutions of the engine of that ship?
"A. The greatest number of revolutions per minute, light, 65.
"Q. What is the ordinary number of revolutions in running her, as you did, from Halifax to Havana, where you were captured?
"A. The greatest number of revolutions is 60.
"Q. What is the ordinary average number?
"A. 60."

* * * * * * *

At *folio* 222:

"Q. What is the hour, according to your record, at which the engine stopped on the evening of the 19th?
"A. By which steamer?
"Q. *Tecumseh*.
"A. 6.10.

* * * * * * *

"Q. How many revolutions had you been running before that?
"A. 56 during the fore part of the day; 58 from 4 to 8.
"Q. Give us the revolutions after you started again. At what time did you start?
"A. 6.30.
"Q. Give us the revolutions after you started.
"A. 58 up to the time we were stopped by the *Mayflower*, at 10."

* * * * * * *

At *folio* 228, on cross examination by the district attorney, he testified:

"Q. Was there any time between 6 o'clock and 10 o'clock—between the time the *Tecumseh* boarded you and the time when the *Mayflower* boarded you—when you lowered your speed?
"A. I think so.
"Q. Any time after you left at 6.30, if that was the hour, up to 10, when the *Mayflower* boarded you, when your speed was diminished?

"A. After 8 o'clock—I think between 8 and half past—speed was reduced two or three revolutions.

"Q. Was there any special occasion for doing that?

"A. No more than the saving of coal.

"Q. Were your instructions from the master or mate?

"A. No, on my own responsibility.

"Q. With that exception you steamed steadily ahead from the time the *Tecumseh* left you until the *Mayflower* captured you?

"A. Yes."

We submit that this evidence is conclusive as to the question of "loitering;" that it was *proved* that the *Newfoundland* did not slacken her customary speed between 6.30, when she left the *Tecumseh*, and 10.10 p. m., when she was stopped by the *Mayflower*, and therefore she did not "*loiter*" near Havana.

(5.) In the face of this clear proof that she maintained her customary average speed, it would be superfluous to argue the question whether, supposing that she did slacken her speed, it was a reasonable or necessary inference therefrom that she did so with the intention of entering the port of Havana.

We confidently maintain that if she had slackened her speed it would not be a necessary nor a reasonable inference from that fact, in absence of all proof of an "overt act" (such as attempting to enter the port, or the like), that she slackened her speed with the intention to enter Havana.

Inaccuracies in the Testimony and in the "Tracing."

We have shown the uncertainties in the testimony of plaintiff as to the *place* attributed to the *Newfoundland*, by "approximate estimate," where she met the *Tecumseh* at 5.35 or 6 p. m., and also as to the *time* when those vessels met and parted. We have also shown that there is no re-

liable foundation for the assumption as to the position attributed to the *Newfoundland* at 8.20 or 8.30 p. m.

The position assigned to the *Mayflower* at 8.30 p. m. was stated by Commander Mackenzie (on the slip pasted on the log of the *Newfoundland* July 19) to be "*about* 8 miles *north* of Morro light" (*fol.* 20).

Lieutenant Culver, of the *Mayflower*, says (*fol.* 119):

"The time of starting the ship (the *Mayflower*) was *about* 7 *miles* from Morro light. * * * It bore *about* south by west half west, I think."

On the log of the *Mayflower* her position off Havana light, her starting point, is put down as 6 *miles* from Havana light and not "8 miles" or "7 miles" (*fol.* 239); and so it is in the statement of distances, which Commander Mackenzie, after the argument was closed, was allowed to put down on the chart of the *Newfoundland*, so that we have, to begin with, the three uncertain guesses of "*about* 8 *miles*," "*about* 7 *miles*," and "6 *miles*," all from the captor's witnesses, as to the position of their own ship.

Neither Commander Mackenzie nor Lieutenant Culver pretend that the positions noted down by them on the tracing and afterwards on the ship's chart were ascertained from actual observations. Lieutenant Pratt had taken no observation by which he could determine what the position of the *Mayflower* was at 8.20 or 8.30 p. m., July 19. He "had been told to take bow and beam bearings off the Morro;" had "started to take it, when he sighted the faint light, and *did not complete it*" (*fols.* 133, 134).

When he first "picked up the light" he "*judged*" the distance of the light from the *Mayflower* to be "2 miles, or *possibly* 3 miles" (*fol.* 130).

He was asked:

"Q. Have you any other data by which you could determine how far from the Morro you were when you saw this faint light?

"A. Yes, I took a bearing of the light as soon as I sighted the vessel, and 35 days' running on a blockade enables you to tell pretty well.

"Q. Your calculations from your habit of seeing, then, is not as good as the log?

"A. Not quite.

"Q. Was that observation, you took, bow and beam?

"A. I took a bearing, and *estimated in my own mind from previous experience.*"

Erroneous Position Attributed to the "Newfoundland."

Her Position at Time of Capture.

Captain Malcolm, master of the *Newfoundland*, testified that when the United States ship of war the *Mayflower*, on the night of 19th July, 1898, "fired the gun it was 5 minutes past ten on board our ship. It was 21 miles north-northwest half west from Havana light" (*Transcript, fol.* 40).

In his testimony on final hearing he stated that the distance from Havana light, at which he was captured, was "21 miles north northwest half west;" that he estimated that to be the distance at which his ship was, because, *first*, "from the course I have been steering that should have been the position of my ship," and, *second*, because "I took the bearing of Havana light when it was dipping, just before 10 o'clock" (*fol.* 166).

When asked how he made the calculation to satisfy himself that it was 21 miles he answered, "Havana light is a 21-mile light; it is visible 21 miles." When asked by what authority he said, "The Sailing Directions for the West India Islands, published by Norrie & Wilson, recognized all through England and the Dominion of Canada, as are all their diagrams and charts."

The witness read from the sailing directions:

* * * "It shows a fixed light, varied by flashes every half minute at 144 feet above the sea, and visible 21 miles."

After stating that 21 miles was the extreme distance according to the circle of illumination on the chart, he was asked, "How did you judge it to be the extreme distance?" He said, "I took the bearings of the light when it was dipping, going out of sight," and that was "the last moment at which I could see it on the bridge;" also that the bridge "is the highest point on the ship except from the masts, * * * 18 feet above the water level. That is the height of my eye when I am on the bridge" (*fol.* 167).

Against this precise testimony, from actual observation, no counter-testimony from observation is put forward by any witness for the captors, and yet the mere assumption, without observation, by Commander Mackenzie that the *Newfoundland* when captured was 17 miles N. N. W. ½ W. is given, in the "opinion" of the district judge, greater weight than the statement of Captain Malcolm from actual observation; and in the theory of the officers of the *Mayflower* and of the *Tecumseh*, which is adopted by the district court, as proof against the ship of the charge of "loitering" off the port of Havana, the distance of the *Newfoundland* when captured is assumed to be 17 and not 21 miles.

Other Errors in "The Theory."

Taking the courses and time of the *Mayflower's* so-called "chase" of the *Newfoundland*, as noted in the extract from the *Mayflower's* log (*fol.* 235), and the rate of speed as testified to by her officers (*fol.* 129), viz., "at 8.20 p. m. engines rung at full speed, * * * after running twenty minutes put on forced draft 135 turns," or according to Commander Mackenzie (*fol.* 90): "We immediately steered for the light and rung up full steam and sent down for the boilers to be

at forced draught, and we got the ship going as fast as we could, and before we got there we were going at the rate of 16 miles." Taking this rate of speed and the courses and times from her log, it will be found that if the *Mayflower* started from a point "six miles from Havana light," those courses and the distances, run at that speed, would *not* bring the *Mayflower* to the point of capture, as stated by Commander Mackenzie, but would bring the *Mayflower* to a point 3½ miles to the southwest from the alleged point of capture (if the last course but one is taken to be 20 minutes) or 4½ miles off (if that course is taken to be 25 minutes).

Again, taking the same courses and time from the alleged point of capture, and running *back* on the courses to the point of starting, it will be found that the starting point of the *Tecumseh* would be ten miles away from Havana light instead of six miles, as stated on the "tracing."

No evidence has been attempted to dispute the truth or accuracy of the positions and courses of the *Newfoundland previous* to her meeting the *Tecumseh* at 6 o'clock. The course of the *Newfoundland*, steaming west, after noon and after she left the *Hudson*, and her position at 4 p. m., are laid down on the chart of the master, and are not disputed by any direct evidence.

The log of the *Newfoundland* was in possession of the United States attorney from July 19, 1898. The testimony of the master was taken *in preparatorio* on July 27. Between these dates and August 30 the Government procured the attendance and testimony of the officers of the *Mayflower* and of the officers of the *Tecumseh*. It could have obtained that of the officers of the *Hudson* and of the *Badger*. It must be assumed that if the position of the *Newfoundland*, as taken from her log and entered on the chart of Captain Malcolm when she met the *Hudson* (a little before noon) or when she left the *Badger*, could have been disputed, the evidence of the officers and crew of those vessels would have been produced. No such evidence was brought forward,

and therefore the course of the *Newfoundland*, as laid down by Captain Malcolm on his chart, and her position at 4 p. m., as proved by Captain Malcolm, must be accepted as both proved and not disputed.

The *theory* which places the *Newfoundland* within a circle at a point marked "A" on the "tracing," $10\frac{3}{4}$ miles from Morro light, involves the assumption that the *Newfoundland* between 4 p. m., where her undisputed record places her, and 6 p. m. had departed from her west course, 14 miles from the coast of Cuba (*fol.* 162), and had run on a southwest course, and then again west to a point five to eight miles from shore (*fol.* 148) and $10\frac{3}{4}$ miles from Morro, covering $18\frac{1}{2}$ miles in two hours against a heavy current from the eastward—that is, nearly two miles per hour beyond her average speed of $7\frac{1}{3}$ miles per hour, as recorded on her log, and $1\frac{1}{4}$ miles per hour *beyond her fullest speed capacity* "in the smoothest of waters" of eight knots per hour—a physical impossibility.

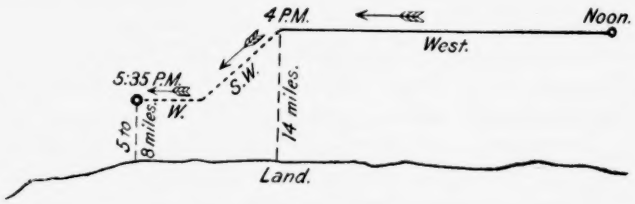
The whole distance she is thus charged to have run from her *noon* position, as proved, to the *Tecumseh's* position, as assumed, and from that point to the position attributed to her at 8.20 on the tracing, and from that position to the point of capture at 10 p. m., taking the shortest distances between each of those points, is $84\frac{1}{2}$ miles in 10 hours (less 20 minutes for the time stopped with the *Tecumseh*), or *over* $8\frac{1}{2}$ miles an hour, another impossibility.

Further Tests of Errors in Lieutenant Culver's Tracing and in the Captors' Calculations of Time and Place from Noon to 5.35 p. m.

Distance from *noon* position of *Newfoundland* (ascertained by observation and recorded on her chart and log) to position of *Newfoundland* when she met the *Tecumseh*, at 5.35 p. m. (as stated by officers of *Tecumseh* and on Lieutenant Culver's sketch), is $58\frac{1}{2}$ miles in a straight line.

Taking 5.35 p. m., it makes her run from her proved noon position, if run in a straight line, 58½ miles in 5 hours and 35 minutes, equal to about 10¾ knots per hour against a strong current (see Lieutenant Nickerson), or 2¾ knots per hour *beyond* her highest recorded speed and 3⅛ miles *beyond* her actual speed between noon and 5.35 p. m. and *beyond* her average speed as recorded on the master's chart and on the engineer's log.

This calculation is based upon the assumption that the *Newfoundland* traveled from her position *at noon* to the position *attributed to her* by estimates of officers of *Tecumseh* in a straight line. They, however, found her going on a west course at 5.35 p. m. She was on a west course at noon off Cardenas 12 miles from land, and on a west course at 4 p. m. 16 miles from land (*chart of Captain Malcolm*). To have got off that course and upon another west course about "5 to 8 miles" from land at 5.35 p. m. (*fol.* 256), the *Newfoundland* must have run southwest for some distance and then west, and must then have gone, between noon and 5.35 p. m., on three lines, one west, one southwest, and then again west, thus:



In other words, she would *not* have gone on a straight line from her proved position at noon to her alleged position at 5.35 p. m., and the theory of plaintiff therefore makes her travel a *longer* course than 58½ miles from noon to 5.35 p. m. and *more* than 10¾ knots per hour—a wholly *impossible* rate of speed.

FROM 4 P. M. TO 5.35 P. M.

Newfoundland's position at 4 o'clock p. m. taken from observation and marked on chart by master at the time—16 miles from land (land receding to south of west at that part of the coast). (*See chart.*)

From that *proved* position at 4 p. m. to position assigned to *Newfoundland* by officers of *Tecumseh* at 5.35 p. m. is 26 miles, in a straight line.

Time consumed, 1 hour and 35 minutes; rate of travel, *16 knots* per hour, supposing she went in a straight line, and *over 16 knots* per hour if she went first on a *west*, then *southwest, and then west*, course—an impossibility.

FROM NOON TO 10 P. M.

Distance from *noon* position of *Newfoundland* to *Tecumseh's* position (as fixed by her officers at 5.35 p. m.), 58½ miles.

Distance from *Tecumseh's* position (as fixed by her officers) at 5.35 p. m. to the position (assigned to the *Newfoundland* by officers of the *Mayflower*) at 8.20 p. m. is 7½ miles.

Distance from *first* position (at 8.20 p. m.) assigned to *Newfoundland* by officers of *Mayflower* to *second* position assigned to supposed light of *Newfoundland* by Lieutenant Culver is four miles (supposing she was at first three miles off and not two miles off from the *Mayflower* off Havana light).

Distance from *second* position to *third* position assigned to *Newfoundland* is 5½ miles.

Distance from *third* to *fourth* position is four miles.

Distance from *fourth* to position of capture is five miles.

From noon to 10 p. m. her run is thus made to be $58\frac{1}{2}+7\frac{1}{2}+4+5\frac{1}{2}+4+5=84\frac{1}{2}$ miles in 10 hours, *less* half hour's detention by the *Tecumseh*, or in 9 hours 30 minutes equal to 8.89 miles per hour, or 1.49 miles *above* her average speed and $\frac{89}{100}$ of a mile beyond her highest known speed per hour, showing that, so far from "loitering" before Havana, she

must have *overrun* her utmost capacity of speed to have passed from her noon position *as proved* through the courses attributed to her by officers of the *Tecumseh* and of the *Mayflower* to the position assigned to her at 10 p. m. by officers of the *Mayflower*.

FROM 6 P. M. TO 10 P. M.

The distance which the theory of plaintiff's witnesses (adopted in the decree) makes the *Newfoundland* run from the point where she is said to have met the *Tecumseh* at, say, 6 p. m. is—

7½	miles	from	6 p. m.	to	8.20 p. m.
4	"	"	8.20	"	8.40 "
5½	"	"	8.40	"	9.10 "
4	"	"	9.10	"	9.30 "
5	"	"	9.30	"	10 "

Total run, 26 miles in 4 hours. Taking off 1 hour and 30 minutes, which she is *alleged* to have lost in "loitering," and she must have run the supposed 26 miles in 2 hours and 30 minutes and at a rate of 10.40 miles per hour, her average speed being only 7.33 and her fullest recorded speed being 8 miles; in other words, 2.40 miles per hour *above* her highest recorded speed and 3.07 miles per hour *above* her proved average speed.

It follows that the *Newfoundland* could not have "*loitered*," as is charged, and that the time assumed of her leaving the *Tecumseh* (5.35 p. m.), as well as the position assigned to her, must both be wrong.

The district judge erred in ignoring this evidence, which proved conclusively that the officers who made the "tracing" and who undertook to fix the positions of the *Newfoundland* were grievously mistaken.

The accompanying diagram shows by the plain *black* lines the course proved to have been run by the *Newfoundland* as recorded in her log and upon the chart of the master.

The courses attributed to the *Newfoundland* by the theory of Commander Mackenzie and of the "tracing" prepared by Lieutenant Culver are shown by *dotted* lines.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

It is submitted that the theory of the "tracing" and of Commander Mackenzie is thus shown to be at fault on all the points it assumes, and that it utterly fails to make out the case of excess of time consumed by the *Newfoundland* after she left the *Tecumseh* in passing the port of Havana.

The Theory was an Afterthought.

This theory, broached by Commander Mackenzie at the second hearing, was, moreover, a clear afterthought—a thought which was not in his mind when he arrested the *Newfoundland* as prize of war. It only entered his mind on the day after the capture and after his communication with the officers of the *Tecumseh*, from whom he obtained the misleading "estimates" as to her position and as to the time when she parted from the *Newfoundland*.

It was not in his mind when he made the seizure and when he prepared the typewritten slip which he pasted on the log of the *Newfoundland*, giving his reasons for capturing her (*fol.* 20). The prominent idea *then* was that he had been "chasing" the *Newfoundland*, and that she had been running away from his pursuit; that she ("the chase") had "changed her course two or three times" before she was "finally brought to," and that she was "out of her shortest course for Jamaica or Vera Cruz." Nothing was then suggested about her "loitering," as he says himself (*fol.* 109), "No; I don't think I mentioned his lights or about his loitering;" and again, "No; I said a little, faint light, afterwards only occasionally visible. That had no reference to her running lights; nor were there any words about her loitering. I made up my mind that as soon as I saw the *Tecumseh* had boarded her that I would see the *Tecumseh* the next morning."

And the next morning he did "see the *Tecumseh*," with the result as shown above, viz., a condemnatory "tracing," prepared by his direction, based upon what now are shown

to be erroneous assumptions as to place, time, and rate of speed and involving an almost complete change of attitude as to the ground upon which the *Newfoundland* should be condemned, the idea upon which he arrested her, of her having frequently altered her course while being pursued by the *Mayflower*, and of her having run away from his 16 knot ship of war for "nearly two hours" at an impossible rate of speed, being abandoned, and the new theory of her having lost time between 5.30 and 8.20 becoming the sole charge of any "overt act" on the part of the *Newfoundland*.

In the above calculations of distances, the courses taken from the log of the *Mayflower* are the shortest possible distances between the points at which the officers of the *Mayflower* claim to have seen the light of the *Newfoundland;* in other words, giving the theory of the captors the benefit of the shortest possible distances run.

These figures show that the theory of the plaintiff's witnesses, as to the estimated positions and time of the *Newfoundland*, is wholly erroneous and the location of her positions wholly inaccurate, and the district judge erred in accepting their testimony as evidence, in adopting their theory as proof, and in allowing it to prevail over the contrary proof of the master of the ship, of his chart, and of the ship's log and the engineer's log.

It may be said that the *noon* position of the *Newfoundland* and her position at 4 o'clock, assumed in the above calculations, rest upon the testimony of the master.

If this were so, Captain Malcolm stands unimpeached by any evidence against his credibility or character.

But the proofs of the course and positions of the *Newfoundland* do not rest on the statement of the master alone. They were recorded on the official log of the ship up to the time of her meeting with the *Tecumseh*. No attempt has been made to dispute their correctness. That record has from

the moment of the capture been in the possession of the court. It fully corroborates the statements of the master.

Captain Malcolm's statements have also been borne out by testimony of other witnesses as to the ship's course, who also are unimpeached.

On the other hand, the fact that it has been clearly demonstrated above that the officers of the *Tecumseh* were wholly mistaken on the 20th July in their retroactive estimates as to the *time* they boarded the *Newfoundland* and the *time* she was allowed to proceed still further intensifies the uncertainty and unreliability of their "estimates" as to the *place* where she was stopped by the *Tecumseh*.

We submit it was error of law for the district court to have allowed such testimony to be introduced in evidence and to be considered by it as proof in the case.

Also that it was error to give to it weight to contradict and overcome the testimony of the ship's records, and the testimony of the officers and crew of the ship, unimpeached witnesses, as to facts regarding the course of the ship, which was exclusively within their knowledge.

Point Four.

No Proof of Acts in this Case to Sustain Inference of Intent.

The district judge himself ruled as matter of law that—

"Condemnation cannot justly follow proof of facts from which mere mental intention can be inferred, unless there is also *proof of acts*, from which the presumption *necessarily* arises, that there is the beginning to put into execution the unlawful intent" (*fol.* 239).

Testing the evidence in the case by the rule, we look in vain for proof of a single act on the part of the *Newfoundland* from which "the presumption *necessarily arises*" that there was the beginning to put into execution the unlawful

intent to go into the port of Havana, which is the *intent* charged.

We fail to find any *act* from which such a presumption would *naturally* or *reasonably*, much less *necessarily*, arise.

Whatever may be imagined or suspected as to her previous intentions, the *Newfoundland*, when arrested by the *Mayflower*, was steaming westwardly at the rate of seven to eight knots per hour, and was 21 miles to the north-northwest half west from the port of Havana, having come from the eastward through the Old Bahama and Nicholas channels, having passed to the north of that port at a distance from it not less than 10 miles according to the captors and according to the testimony of the master as far as 17 or 17½ miles away from it. When going through those channels, which were passed at much less distances from the entrance of the other several Cuban ports, she had nevertheless passed several miles to the north of the cruising grounds of all the blockading fleet on the north coast of Cuba, had been "chased," stopped, examined, and released by three other blockading vessels, no one of whom had found her heading for any Cuban port, blockaded or not blockaded, every one of whom had found her pursuing her west or northwest course, and the last one of whom, after boarding her, at 6 or 6.30 of the same evening, at a point at least 10 miles north of Cuba and northeast of Morro light, had seen her at dusk steaming northward to westward away from the direction of and proximity to the port of Havana. When arrested at 10 p. m. by the captors she was found at a point 21 miles north-northwest one-half west from Havana on the continuation of her previous west course, with no proof of her having, at any time between 6.30 p. m. and 10 p. m., been seen to head for Havana or any other Cuban port.

What "proof of acts," then, is there from which could arise the presumption that there was, on the part of the *Newfoundland*, "the beginning to put into execution the unlawful intent" to enter the port of Havana?

Did the Newfoundland "Approach Havana" After She Left the Tecumseh?

The district judge (*fol.* 255) says:

"It must be conceded that there is no proof of any attempt to enter the port of Havana—that is to say, no witness has testified to seeing her heading that way. It must also be admitted, that the testimony as to loitering falls very far short of the proof offered in the *Neutralitet*, the *Apollo*, the *Charlotte Christine*, the *Gute Erwartung*, the cases relied on by the Government."

Why, then, was she not immediately released?

The district court held:

"All of these cases arose before the days of steam power, but the principles upon which they rest, and which I hold to be sound principles, require their application to conditions now prevailing, when the use of steam power renders the eluding of blockades a far more facile undertaking, and I feel compelled to hold that the whole purpose of a blockade would be rendered nugatory, if a steam vessel is allowed after notice to approach in the night-time so near to a blockaded port as to be able to see signals from the shore and to watch for the opportunity of entering, if it should appear that the coast is clear or the vigilance of the belligerent cruisers is for the time relaxed. A ship so approaching lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade and there is a necessary presumption of sinister motive, which must be rebutted by positive proof that her presence there is innocent; that she is there either for some necessity or in the course of a voyage which requires her to pass that way."

A glance at the map will show that a vessel passing from the Old Bahama through the Nicolas channel bound for Vera Cruz or for Kingston, Jamaica, round the west end of Cuba would be on her natural course if she passed even *within* 10 miles north of Havana going west. The *Newfoundland* therefore, after leaving the *Tecumseh*, sailing west

and passing Havana at or over 10 miles north of Havana, was "in the course of a voyage which required her to pass that way" in order to get into the gulf of Mexico by the shortest and best route from Nicolas channel to Vera Cruz or to Kingston. Had she gone further north than she did go she would have gone out of her natural course.

In the *Neutralitet*, 6 Ch. Rob., at p. 34, Sir William Scott said:

"If a ship comes into the Downs, which is the common passage and *highway* to the German ocean and to different parts of Europe, it would not be at all just to infer from the mere coming there that she is necessarily coming to a British port."

The fact that in passing at that distance from the entrance to Havana a ship might see signals from the shore is surely not reason enough to require her to deviate from her obvious and natural course or to expose her to suspicion. The suggestion would have some pertinency perhaps in this case if there had been any shadow of proof or suggestion that signals were made to her from shore or returned by her. As matter of fact there is no such evidence. No signals were ever made to her or by her. Nor had the *Newfoundland*, assuming that she passed no farther than 10 miles off, "*approached*" the blockaded port of Havana. Even if the incompetent and insufficient evidence of the officers of the *Tecumseh*, who by mere approximate estimations located the position of the *Newfoundland* at 5.35 p. m., where she had met the *Tecumseh*, assumed by them to be $10\frac{3}{4}$ miles northeast from Morro, is to be accepted without question, that same evidence shows the *Newfoundland* at dusk steaming off west by north from that place of meeting.

Now, let us suppose that the *Newfoundland* was at that point ($10\frac{3}{4}$ miles northeast from Morro and 5 or 8 miles from land) at 6 p. m., then, from that point, in order to reach the point where the officers of the *Mayflower* claimed to have

sighted the *Newfoundland* at 8.20, namely, 10 miles north of Havana, she must have sailed northwest, increasing her distance from Havana at every minute of her progress. Was that "approaching" Havana?

Again, when she steamed north-northwest from the place of meeting with the *Tecumseh*, the latter had shaped her course "leisurely" back on a southwest course "in the direction of Havana light," back to her "usual place," 6 miles from Havana light (from which place she had steamed at 5.15 p. m. to overhaul the *Newfoundland*), thus placing herself in position again near Havana entrance and on guard between that entrance and the *Newfoundland* or any other passing vessel. If, then, between dark, say 7 p. m. and 8.20 p. m., the *Newfoundland* had changed her course from a north-northwest or west to a southwest course, and attempted to approach Havana, she had palpable assurance that in doing so she must inevitably encounter the *Tecumseh* in her path between the point of departure and Havana entrance. She could not have approached Havana without meeting the *Tecumseh* again and very shortly. Is it to be imagined that however much she may have desired or intended to attempt to enter Havana, the *Newfoundland* would have incurred the risk of a second encounter on that same evening from an armed blockading vessel, or at any time within an hour and a half after having been stopped and boarded by such vessel?

Beyond that, the master of the *Newfoundland* had "asked the boarding officer of the *Tecumseh* if there were a number of blockading ships to the westward," and had been told that there were "30, or along there" (*fol.* 146). Is it to be imagined that he, being not more than 10¾ miles northeast from Havana light, as is pretended, with the *Tecumseh* between him and the entrance, and in face of the notice that there were thirty other armed blockaders to the westward of his position at 6 p. m., would have changed his course and have approached Havana between 7 and 8.20 o'clock,

or that he would have "loitered" at that time and in that vicinity "to watch for the opportunity of entering it"? Had he not been assured by an officer of the *Tecumseh* that the coast was not only *not* clear for such approach or entrance, but that it was profusely guarded? And as to the vigilance of cruisers being relaxed, had he not had enough experience to convince him of the unrelaxing and excessive vigilance of at least three such cruisers within the run from Neuvitas to the *Tecumseh*, each of whom had successively steamed miles outside of their several cruising grounds to overhaul his ship? Again, was he at any time "*cy pres*" to Havana; was he ever "*so near* as to be able to enter"? Was the *Newfoundland* at all within the principles of the *Neutralitet* and other cases cited and within the *cy pres* doctrine of prize courts?

The district judge says: "It must be admitted that the testimony as to loitering falls very far short of the proof offered in the *Neutralitet* and other cases cited by the Government, *but* that all of these cases were before the days of steam power;" and the view of the court was that the principles of those cases ought to be applied "to conditions now prevailing when the use of steam power renders eluding of blockades a far more facile undertaking," and therefore it seems to have been thought by him that the doctrine of approaching *cy pres* should now be changed as against steam vessels, and that the limit of "so near" should be indefinitely enlarged to cover the whole neighboring seas.

The district judge seems to have lost sight of other "conditions" now prevailing, viz., that if the use of steam renders it easier in point of time for a blockade-runner to approach and enter a port, the same use of steam gives to the blockading force an equal and a greater power of overtaking such blockade-runners and of intercepting and *preventing* such attempted entry.

In addition to this, as ships of war are now constructed with especial aim of securing great speed, on a question of

"equivalents" the relative gain from the use of steam preponderates decidedly on the side of the blockading force as against the blockade-runner (*The Olinde-Rodrigues, supra*).

Again, if blockade-running has developed in modern times as an art or as a profession, there has been a correspondingly greater attention paid by blockading powers to the effectiveness of blockades in the increased number, speed, and armament of blockading ships of war.

As matter of public history and of public fact, therefore, of which the court will take judicial cognizance, it cannot be truly said, as is stated in the decree of the district court, that "the use of steam power renders the eluding of a blockade a far more facile undertaking," an easier business than it was before the days of steam.

This suggestion of the decree, then, we submit, fails to furnish any ground for a change in the rule of *cy pres* approach to a blockaded port or for raising a presumption of sinister intent from the mere presence of a steam vessel at a distance of 10 miles or more from such a port and on a public highway on the ocean, there being no other fact proved by which she could be condemned.

We contend farther that the district court erred in its construction of the rule of *cy pres* approach and in the application of that rule to the facts of the present case.

Cy Pres Approach.

"Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry, therefore, into such vessel, being neutral, by a belligerent is an act of force and is *prima facie* a wrong, which can be justified only when done for some purpose allowed to form a justification by the law of nations. * * * The ocean is the sphere of the law of nations, and any merchant vessel is by that law under the protection of the laws of her own nation and may claim immunity unless in cases in which that law allows her to be entered or visited."

Mr. Webster to Lord Ashburton, cited in Wheaton's Law of Nations, pp. 737–739.

The exact limit of the line within which a vessel might be said to be within "blockade water" has not been, and probably cannot be, actually determined. It may be assumed to be certainly beyond the range of cannon shot from the shore. It could not, however, be extended beyond the limit which it was necessary for the blockading vessel or vessels to hold for the effectual blockade of a given port. The blockading vessels were bound to occupy such a position, near to the entrance of the blockaded port, as would enable them *effectually to prevent* blockade runners from slipping into such ports. The line of "blockade" or "forbidden water" could not then, constructively or otherwise, be extended further into the open sea, nor could the line of justifiable arrest be so extended (except only in the case of a vessel which had already and in the inception of her voyage placed herself in the category of an enemy by the act of avowedly sailing for a blockaded port or by the act of actually entering or coming out of such port).

In the case of the blockade of Havana and certain other ports in the island of Cuba in the late war with Spain, the limit of six miles from the entrance seems to have been adopted by the United States as the proper cruising ground or station for the blockading vessels in daytime; at night they could go closer in.

Within that limit of distance, six miles from the shore near the Havana entrance, may then for the purposes of this case be conceded to be "blockade water." Beyond that distance the waters of the Old Bahama channel and of Nicholas channel were the open sea, free to all neutral nations, "the sphere of the law of nations," as Mr. Webster has it, the use of which, with absolute immunity, by merchant vessels is guaranteed by that law.

Before a vessel by her mere proximity to a blockaded port can subject herself to well-grounded suspicion of intention to violate the blockade she must be found certainly within that line, either coming out from or heading for such

port, or, in the language of Sir William Scott, she must "*approach cy pres, close up to* the blockaded port, so as to be enabled to slip in without obstruction" (*The Neutralitet*, 6 Ch. Rob., p. 35), or, in the words of Bynkershoek, "which should be *found so near those ports as to show beyond a doubt that they intended to run into them.*"

This language is taken by Bynkershoek from the words of a decree of the States General, published in 1830, with the advice of the courts of admiralty and the ablest Dutch civilians, to regulate the blockade of the ports of Flanders in possession of Spain, the language of which decree is:

"Qu'ils sont, si pres, qu'il est *indubitable* qu'ils y veulent entrer."

Wheaton's Law of Nations, p. 140.

Now, the *Newfoundland* was found by her captors, according to their own estimate, between 17½ and 21 miles north-northwest half west from the port of Havana, heading west or northwest. Was this (in the words of Bynkershoek) being found "so near as to show beyond doubt that they intended to run in," or was it, in the language of Sir William Scott, approaching "*cy pres, close up to* the blockaded port as to be enabled to slip in"? The idea of slipping in from a point 17 or 21 miles off seems even in the case of a steam vessel to be almost absurd.

But she must not only be "close up" to the blockaded port, but so near "as to be enabled to slip in without obstruction." That could scarcely be predicated of the ability of the *Newfoundland*, she being at the outside only an 8-knot ship, less than speed capacity of many sailing ships, to get into a port with 30 or more warships of 10 to 16 knot capacity, guarding the entrance of Havana or in the vicinity.

Nor in the language of Bynkershoek was she "found so near" * * * as *to show beyond a doubt* that "she intended to run into" Havana. According to the rule, her proximity must have been such as to *show beyond a doubt*—

that is, to exclude any other inference but the one—that she intended to run into the port of Havana. Surely a proximity of 21 or 17 or even 10 miles off, heading away from a port, cannot be said to show such an intention "*beyond a doubt.*" Beyond a doubt certainly means that from her mere position no other intention than that of entering can be inferred.

In the case of *The Neutralitet*, the offending ship was found *anchored in the roads*, considered to be *in the port* of Ostend, the blockaded port.

She was "lying within a sand and within the protection of the batteries and in a place where ships of large burden are unlivered by lighters as the more commodious method of delivering their cargoes at Ostend."

Even upon so strong a state of facts, Sir William Scott *would not in that case* lay down the general rule, which he thought would be no unfair rule of evidence to hold as a presumption *de jure where a ship approaches cy pres close up to a* blockaded port, *so as to be enabled to slip in without obstruction*, that she goes there with an intention to break the blockade. He decided the case on the facts and held that it was not a prudent and natural course that the master should have gone *into the port* of Ostend to get a pilot, as he claimed, and to anchor there, as he did, *in the roads*, and he concluded *from the evidence* that he had not gone there with an honest intention, but that he must have gone there for no other purpose than "to import her cargo into Ostend." It was in that case (*The Neutralitet*) that Sir William Scott said, as quoted above:

"If a ship comes into the Downs which is the common passage and highway to the German ocean and to different parts of Europe, it would not be at all just to infer from her mere coming there that she is necessarily coming to a British port."

So, we say here, that if a ship comes into the Old Bahama or Nicolas channel, the common passage and highway from

the Atlantic ocean to the gulf of Mexico and different parts of the West Indies, Mexico, and South America, it would not be at all just to infer from the mere coming there that she is necessarily coming to a Spanish or blockaded port.

In the case of *The Charlotte Christine*, 6 Ch. Rob., 102, the master admitted that he had stood *within one mile* of the shore *after* he had perceived a pilot-boat to be coming out to him. * * * There was then no necessity for him to go in further, *yet he continued to approach the shore*, and after he had been hailed by the captors and *had refused to bring to* on the first notice, "and he *continued to approach and in defiance* of the captor's boat, since it appears that he did not bring to until a gun was fired at him."

In the case of *The Gute Erwartung*, 6 Ch. Rob., 182, the ship, with an asserted destination to Caen, was captured 20 miles from Havre. She had arrived off Cape Barfleur and had then stood off that coast till about two in the morning, when she *changed her course* and was steering, according to the master's evidence, "in a course *direct to Havre*, and with an intention of going in close under the land for the purpose of taking a pilot on board to carry him to Caen."

This circumstance, it was held, "placed her in construction of law in the same situation which the other vessel" (the *Charlotte Christine*) "had actually reached." In the former case the vessel had continued her course close under the batteries, and was cut out at some considerable risk and damage to the blockading vessel. "Here, then," said Sir William Scott, "we perceive the same intention and in the course of being pursued to the same illegal effect. * * * It is impossible that any blockade can be maintained if such a practice is allowed that a vessel under a destination to a port not interdicted shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries. * * * I am of opinion that the master in this case had *declared an unlawful purpose* and was *employed in pursuing it to an un-*

lawful act, and *on that* the ship and cargo must be pronounced subject to condemnation."

There is no symptom of similarity between the facts of these cases and those of the *Newfoundland*, and her steering past the port of Havana under the circumstances on the natural course of a ship sailing out of the Old Bahama channel through the Nicolas channel into the gulf of Mexico, even if she had passed as near as 10 miles, would not place her "*cy pres*" to Havana entrance "as to enable her to slip in without obstruction" or "so near" as that it could be said that she must have *indubitably* intended to enter. Being 10 miles off or steaming past a port is not such proximity thereto as to be reconcilable with no other supposition than that "beyond a doubt" she *intended* to enter.

Point Fifth.

As to the Preponderance of Testimony.

It may be said that the proof above considered rests upon the testimony of the master of the *Newfoundland*. Suppose this were so. Upon what better testimony, we ask, could it rest? The courts of England and of this country have habitually regarded such testimony as worthy of all credit where it has not been impeached, and the principle is recognized that preference is given in all courts to the testimony of witnesses as to facts, which lie peculiarly within the knowledge and within the means of knowledge occurring in the course of their business, over supposition or conjecture of those whose business does not give them the means of knowing or bring them in actual contact with the facts as to which the proof is offered; and the prize courts of the most civilized nations give the preference to unimpeached evidence coming from the officers and crew of a captured neutral vessel.

No attempt was made in this case to impeach the credi-

bility of any of the witnesses for the defense by evidence as to character or otherwise.

The effort was made to diminish the force of the testimony of Capt. Frederick N. Malcolm, master of the *Newfoundland*, by the suggestion that he was sailing under a false destination. This suggestion is based upon the fact that the ship's manifest shows that his destination was Vera Cruz, Mexico, and Kingston, Jamaica, while in the testimony Captain Malcolm stated that he also had verbal instructions to go to Caybairien or Sagua la Grande, in Cuba, in case those ports were open.

The district judge in his opinion (*fol.* 252) says:

"While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of great and just suspicion that her real and primary destination was to neither of these ports, as subsequent events proved."

Sir William Scott, in the case of *The Rising Sun* (2 C. Rob., 105), says:

"In this case * * * the destination is very inaccurately expressed, some of the papers describing it to have been to Charleston, others to Altaia, whereas the true destination was to Guernsey; *but as they are both neutral ports, I do not think there is much in that*, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port."

In our own case of *The Watchful* (6 Wall., 93) "the vessel cleared for Hamburg, when her destination was certainly Matamoras (Mexico) * * * her clearance was probably altered after she was at sea by writing over the word 'Hamburg' the word 'Matamoras' * * * a false manifest was used, and the fact of the main cargo of 252 cases of arms was carefully concealed from the officers of the customs at New York, from which port she sailed;" and yet the court

held: "It is very clear that there is no case of prize made out by the evidence * * * libel was properly dismissed."

Captain Malcolm, in his testimony taken *in preparatorio*, had frankly stated that at Halifax, Nova Scotia, he was ordered to clear his ship for the ports of Vera Cruz and Kingston, but that verbal instructions were also given to him before sailing from Halifax to proceed to the island of Cuba and to land his cargo at either the port of Caybarien or the port of Sagua la Grande, in case he, on arriving there, should find that those ports were not blockaded, but that on no account was he to attempt to enter either of those ports in case he should find that they were blockaded. He was not to attempt to enter any blockaded port, and that in case he found those ports blockaded he was to proceed to Kingston, Jamaica, and cable the owners for instructions (*fol.* 45).

At the time this testimony was given there was no reason (not even the duty of entire frankness) why Captain Malcolm should have said anything to the prize commissioners about Caybairien or Sagua la Grande or about the verbal instructions to go to those ports if they were not blockaded. He had been told by the officers of the *Badger*, off Neuvitas, that the whole island of Cuba was blockaded. He had thereupon abandoned all idea of going into either of those ports (*fol.* 188). He had steamed past those ports on the idea that he ought to pass them in order to satisfy his owners and charterers. In passing them he had seen no blockading vessel at or near the entrance. Nevertheless he had not stopped or made any attempt to enter into either of them. After passing them he had continued his course westward, intending to go to Kingston, Jamaica, on a course which was the natural course from a point off Sagua la Grande to Vera Cruz or to Kingston.

If he had said to the prize commissioners nothing about his verbal instructions or about Caybairien or Sagua, no one would have been any the wiser or have known that he

had had provisional instructions for those ports, or that he had even contemplated going into them.

His perfect candor, instead of working in his favor as a witness, has been used as the basis of an argument of suspicion as to the real intent of his voyage and of his intending to violate the blockade; and yet he might, within the bounds of perfect candor, have well dismissed the matter of his instructions as to Caybairien and Sagua as a thing of the past and as a matter of no importance to be mentioned and have omitted the instructions entirely in his testimony. He says in his testimony that after he had been told by Lieutenant Titus, of the *Badger*, that the whole island of Cuba was blockaded he had considered his instructions as to those ports canceled so far as attempting to enter either of them went (*fol.* 183).

It is also said that he "concealed" his verbal instructions from Lieutenant Titus, of the United States ship *Badger*.

If he had in fact concealed those instructions, such concealment was not calculated to deceive, nor did his silence on the subject operate any deception or influence any one's action. It certainly did not affect the action of Lieutenant Titus or of any blockading vessel.

"Concealment must be shown to have been a *fraudulent* suppression."

The Anna Catharina, 4 Ch. Rob., 88 (London ed., 107).
See also *The Rising Sun* (2 Ch. Rob., 105).
The Watchful (6 Wall., 93).
The Pizarro (2 Wheaton, 91).
2 *Pothier Ev.*, 337.
Best on Ev., 414.
2 *Wharton's Law of Ev.*, § 1267, p. 398.

Nor did his silence as to the verbal instructions secure to himself any advantage whatsoever. After having been told that the whole island of Cuba was blockaded, there was then no reason or requirement of duty or good faith for him to say to Lieutenant Titus: "I had instructions to go into

those ports in case they were not blockaded." It would have been a superfluous and meaningless piece of information for him to give to Lieutenant Titus; but, in point of fact, he was not guilty of any concealment and there was nothing which would make his silence fairly construable as an intended concealment. When stopped and boarded by the *Badger* his ship's papers were called for and examined. He inquired of the boarding officer, Lieutenant Titus, as to the blockade and was told that the whole coast was blockaded. The statement of Lieutenant Titus, it appears now, was untrue in point of fact, but it was nevertheless accepted by Captain Malcolm at the time, notwithstanding it contradicted the information as to the blockaded and open ports of Cuba which had been given to him in Halifax (*fol.* 55), and it determined him *not* to go into Caybairien or Sagua. Having, on his entry into the Old Bahama channel, encountered first the threatening approach of a United States war vessel bearing down upon his ship, running ahead of him, then circling around him and dropping its search light upon him, then standing off a little way and firing a gun to stop him, and then boarding him and examining his papers (*fol.* 155), he might well have felt startled, and, being under peremptory orders not to get his ship in trouble, it was most natural for him to experience some distraction of mind and considerable uncertainty as to what he should do (whether to turn back on his course and go to the eastward or to continue on his previous course westward). In this condition of affairs he asked the boarding officer if he could safely go westward, and was told that it would be perfectly safe to do so (*fol.* 181).

On cross-examination by the district attorney he testified:

"Q. And when you were boarded by these U. S. ships you were asked where you were going?

"A. I was.

"Q. Did you tell them your real destination was a Cuban port?

"A. I did not.

"Q. What was your object in deceiving these officers from the U. S. vessels?

"A. I did not do it with the intention to deceive; under the circumstances, my destination was *not* a Cuban port.

"Q. But you have sworn positively the real destination was a Cuban port?

"A. *If those ports were open.*"

At *folio* 182, he answered:

"Q. Was it your judgment—you were told of this off Neuvitas—that you couldn't make either of these ports that you were bound for? Is it not several hundred miles nearer to Kingston around Cape Maysi from the point off Neuvitas than it is to go around the way you were heading?

"A. It is undoubtedly, but I was going when I met the *Badger* on the west course. If, after the *Badger* left me, I had turned round and gone in an easterly course, I considered I would be submitting myself to unnecessary suspicion.

"Q. Otherwise it would expose your secret instructions to the officers of the *Badger?*

"A. No; I did not say that, and I don't mean that. I meant what I said. To meet a warship going on a course, and, after meeting it, to turn round and take another would be a matter of suspicion.

"Q. Would it have been a matter of suspicion to tell the instructions when you found out about those ports and to turn round?

"A. I don't know. A person placed in the position I was perhaps don't always do what he would do afterwards. I had another reason. I wished to pass those ports, although I felt they were blockaded. I wished to satisfy the owners. There is a clause in the charter-party which says the master is liable to be dismissed by the charterers if he does not satisfy the charterers. I wanted to satisfy my charterers that those ports were blockaded.

"Q. You never did tell any of these officers who boarded you that you had any other destination than that mentioned in the ship's papers?

"A. I did not, for after I passed the *Badger* I *had no other destination* except what was mentioned in the ship's papers.

I considered that my instructions were cancelled in regard to those ports when the *Badger* told me they were blockaded, and I acted accordingly.

"Q. Then you desire to change what you said a few minutes ago, that you wanted further evidence than what they gave, and that you went on past those ports to see?

"A. I said I wanted to satisfy my charterers, although I was perfectly satisfied in my own mind, but by passing those ports on the log that would be evidence to satisfy them. I didn't want further evidence for myself.

* * * * * * *

"Q. You were going to Kingston; that was your destination; where you were instructed to go?

"A. From the way things turned out, Kingston was my real destination. Had I turned around after I passed Sagua I would have been as bad in that shape as before. I would have had to go east."

The court will be able to judge for itself whether Captain Malcolm's testimony bears the internal marks of truth and honesty, or whether it is shaken by the suggestion of suspicion, based solely on the fact that, when told by Lieutenant Titus, of the *Badger*, that the whole coast of Cuba was blockaded, he did not then and there *instantly* make up his mind as to his proper course, and did not then and there *instantly* decide to turn back from his previous west course and go eastward by the shortest course from that point to the island of Jamaica.

The court will bear in mind that his instructions were to "enter either the port of Sagua la Grande or Caybairien and there deliver the cargo to the order of the shippers. If those ports were blockaded I was not to enter or to attempt to enter, but I was to proceed to Kingston, Jamaica" (*fol.* 151).

Also that those ports were *not* blockaded then or at any time during the war with Spain. It is declared in the decree of the district court (*fol.* 252) also that Captain Malcolm had sailed from Halifax upon the assurance that those ports were open.

"Before sailing I asked Musgrave and Company to give me a list of the blockaded ports of the island of Cuba. This is what he gave me." * * * Map annexed, Ex. A (*fol.* 55).

The incorrect statement of Lieutenant Titus that the whole island of Cuba was blockaded contradicted the information under which Captain Malcolm had sailed from Halifax. The notice was calculated to surprise him and to embarrass him as to his proper course under his instructions. It added to the natural surprise and embarrassment of his unexpected arrest while on his way to the open ports of Caybairien or Sagua. He was entitled, in reason and fairness, to have time to deliberate as to his proper course under the notice of Lieutenant Titus. In this natural state of embarrassment it is asking too much of him that he should *instantly* have decided to go to Kingston, and to go there by the *shortest* route, and that, too, in the face of the fact that it involved his turning round from his west course on which he was steaming previous to his being stopped and his going back to the eastward, *especially* when he felt that he would thereby subject himself to suspicion, and when he had the idea remaining still on his mind from his instructions that he ought to go past Caybairien and Sagua "to satisfy his owners and charterers."

Furthermore, the master of the *Newfoundland* was compelled to act under difficulties in which he was unfairly placed by the false notice of the *Badger*.

Effect of a False Notice by a Blockader.

In the case of *The Hendrick and Maria*, 1 Ch. Rob., p. 124, the vessel was taken on a voyage from Norway to Amsterdam. The master had been "warned not to go to any Dutch port," but had declared "he must proceed according to his bill of lading." The notice of blockade of all Dutch ports at that time was not true. *Sir William Scott* said:

"The notice is, I think, in point of authority illegal; at the time it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty and a commander of a king's ship is not to extend it. * * * The notice is also I think as illegal *in effect*, as in authority; it cannot be said that such a notice though bad for other ports is good for Amsterdam. *It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress* and I am of opinion, that if the neutral had contravened the notice he would not have been subject to condemnation. * * * I think the conversation of this man was not an expression of final intention; but that of a man *deliberating under difficulties, in which he was unfairly placed.* The master said 'he could not answer it to his owners to go to any place but Holland.' The commander does not point out to him any ports of Holland to which he might go; but tells him he might go to Bremen, Hamburg, or England. * * * I think the notice was erroneous and besides not broken; and therefore I restore this ship."

Captain Malcolm in his distress asked the boarding officer, Lieutenant Titus, "if there was any danger in going west. He told me no; that there was no danger whatsoever * * *" (*fol.* 156). He therefore continued his west course. He seems to have felt impelled to go past Caybairien and Sagua to satisfy his owners, under the same sort of idea which impelled the master of *The Hendrick and Maria*, who, being under instructions to go to Amsterdam, when told not to go to any Dutch ports, said "he could not answer it to the owners if he went to any place but Holland." So Captain Malcolm, having instructions to go to Caybairien or Sagua, felt that he could not answer it to his owners and charterers if he did not at least go past those ports. Having done this and in the meantime, after leaving the *Badger*, and having *finally* settled in his own mind that he would go to Kingston, he continued his course westward as the only

safe course for him to follow. Having started again, the farther westward he went, the more suspicious and unsafe, in his conception, would it have been for him to turn back and go eastward. It does not seem to us to be at all difficult to comprehend his action in the dilemma in which he was placed by the false notice and to reconcile it with his absolute truth and good faith. It certainly is not warrant for discrediting his testimony or for the conclusions reached in the decree of the district court (*fol.* 254), namely, that, in spite of his oath to the contrary, Captain Malcolm never had had instructions to go to Caybairien or Sagua or for the suspicion that he had secret instructions to go into Havana. Captain Malcolm's testimony has on every other point been fully corroborated, and we contend that he stands before the court not only an unimpeached witness, but one entitled to the highest credit.

The Entry by Mate Salkus on the Log of the "Newfoundland."

Much has been made in argument and in the decree of the district court (*fols.* 245–248) and in testimony (*fol.* 103) of the entry made by the mate, Salkus, on the ship's log kept by him, viz., "8.30 Havana light, south 10 miles," as contradicting Captain Malcolm's calculation and statement that when he passed Havana light at 8.30 the *Newfoundland* was 17½ miles to the north of Havana, and as corroborating the "approximate estimates" of the position of the "faint light" sighted at 8.20 by the officer of the *Mayflower*, and as an *estoppel* upon the *Newfoundland*.

The mate, Salkus, in his testimony swore that he made this entry without having taken any observation or bearing (*fol.* 202):

"Q. In that log you have stated that in passing Havana entrance you were 10 miles off shore?

"A. Yes.

"Q. How did you arrive at 10 miles?

"A. We didn't get no 4-point bearings of the light before; we didn't see the light until a point before the beam; too far off. I just took a rough calculation and gave the ship the benefit of the doubt. We didn't have no correct bearings, and it is safer to give the ship the benefit of the doubt.

"Q. You made no calculation?

"A. No; guessed at it in going below.

"Q. And you put it down, giving the ship the benefit of the doubt?

"A. Yes. We didn't take any correct bearings.

"Q. Why did you think it was more than 10 miles off?

"A. By the distance the light showed. When we saw the light it was a point before the beam, bearing west by south."

On cross-examination he said (*fols.* 208, 209):

"Q. You kept the official log of the ship?

"A. I did.

"Q. Didn't you put in there the best knowledge you had of your position whenever you recorded it?

"A. Yes; if we had proper bearings of the lights. 4-point bearings or cross-bearings would be the proper position.

"Q. Now, here you have your entry 8.30, Havana light being south 10 miles.

"A. Yes. We didn't have no bearing of the light.

"Q. You now say 16 or 17 miles?

"A. About that.

"Q. Didn't you at the time you made this entry put down the best knowledge of your position you had then?

"A. No. I knew the ship was further off, and as we had no point bearings I put down less than the actual distance was.

"Q. Why didn't you put it down the best you knew?

"A. As I considered at 10 miles the land was a long way off, without having any bearings * * *

"Q. Didn't it occur to you by putting your distance here on your chart nearer to shore than you actually were that you were endangering yourself by showing you hadn't obeyed instructions?

"A. No; I didn't, because any vessel coming along the coast would know we were further off at the time as well as we did.

* * * * * * *

"Q. You spoke about giving the ship the benefit of the doubt. What do you mean?

"A. Giving the ship the benefit of the doubt means letting the ship have the benefit, if any, of the distance off shore—that is, the soundings. Where they lost a ship they said, Why didn't the captain give the ship the benefit of the doubt? If he had given the ship the benefit of the doubt and run in deep water, he would not have lost his ship. It was one of the best boats the Allens lost by not giving the ship the benefit of the doubt."

It is apparent from his language that Mate Salkus is not a learned man. Taking this in view, it is easy to see that his theory of proper navigation in running along a coast is that where he has no four-point bearings to calculate the distance from the shore the safe thing to do is to put down the distance at the lowest possible figures, so that those who succeeded him at the helm would direct the course of the ship no nearer to the shore, but, on the contrary, would allow for a possible doubt by steering outside of the limit so put down. "Giving the ship the benefit of the doubt" in saying "ten miles" from shore, in his view, then, seems to be the equivalent of saying "not less than ten miles."

Whatever may be thought of the intelligence of this witness or of the clearness of his explanations, it is certainly shown that the "10 miles" recorded by him was not put down or pretended to be put down by him from any "observations" or "four-point bearings" or other accurate calculations, but was an offhand guess, and when put down by him was not intended to mean that the ship was no farther off than 10 miles, but the contrary, viz., that she was not less than 10 miles from Havana light. We submit that the entry on the log by Mate Salkus was open to explanation by him and by the ship's other record, and that being explained, the entry is not, as has been contended by the captors, irrevocably binding as an *estoppel* upon the ship.

It is a statement so made by the mate, subject to correc-

tion by the calculations of the ship's position, as ascertained by the master from observation and recorded by him on his memorandum book and on his chart (*fol.* 190).

As to the mate's entry in the log, viz., "Havana light being south 10 miles," the district judge held as follows (*fol.* 238):

"It is not necessary to discuss nor to decide, now, how far a ship is concluded by entries in her log. If the party making such entry is shown to have been drunk at the time or habitually careless, or if made in a perfunctory way without observations or the opportunity of observations, little weight is to be given it; but the log being intended to be a correct record of the facts contained therein an entry made with full knowledge and opportunity of ascertaining the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed."

We submit that the district court erred in this ruling. The mate, Salkus, as shown above, expressly says that when he made that entry he had *not* "full knowledge" or "opportunity of ascertaining the truth" as to the exact distance of the ship from Havana light at 8.30 p. m. (*fols.* 202–209); *also* that he had made no calculation; had merely "guessed at it in going below" (*fol.* 202); also that "we didn't take any correct bearings," and that he made the entry 10 miles to "give the ship the benefit of the doubt," believing, "by the distance the light showed," that it was *more* than 10 miles off—that is to say, to be on the safe side, he put it 10 miles.

The entry in no way in this litigation "tells against the party making it"—that is to say, against the mate, Salkus—he having no interest in the matter, and we submit it is error of law to say that "it must be accepted as the truth" against the owners of the ship and cargo, who did not make it; that it cannot be allowed in their behalf to be explained by the mate, who did make it, or that it cannot

be corrected by the first and best evidence as to the ship's true position, viz., the chart on which are recorded the previous positions and course of the ship from regular observations by the master; and it was error to hold that the offhand guess of the mate, made *without* "observation" or "four-point bearings" or calculations, cannot "be denied no more than a deed."

We also contend that it is not necessary for the owners of ship and cargo to show that the mate "was drunk or habitually careless," in order to relieve them from the "*estoppel*" attributed to the mate's entry. His explanation is amply sufficient to do away with the whole force of the entry as a statement by himself and as by an admission by the ship. The positive proof by the master correcting the error of the mate is "conclusive evidence of the mistake" and establishes beyond a reasonable doubt the fact that the *Newfoundland* was at 8.30 at a distance north of Havana light of 17½ miles, and not 10 miles.

Positive and Precise Testimony as Against Speculations of Witnesses.

Four unimpeached witnesses testify that the *Newfoundland* sailed from 8 p. m. on the 19th July a due west course—the master (*fols.* 51, 53, 56, 152, 157, 158, 159, 161, 162, 163, 166, 168, 173); the mate (*fols.* 65, 203, 205, 207, 208); the second mate (*fols.* 215, 216), and Levi Blackmore, sailor at the wheel (*fol.* 219). The actual speed of the ship throughout the voyage is testified to by the chief engineer, who kept the record in the engine-room of the number of revolutions of the engines, and the time is also kept on his record or engineer's log taken from a clock in the engine-room (*fol.* 221). This engineer's log corroborates the log of the ship throughout the voyage, and also corroborates the statements of the master (Captain Malcolm) taken down by him

on his chart from his observations and made by him on the stand, as also those of the mate and other officers.

Taking the whole testimony of these witnesses together, the course of the *Newfoundland* and the positions as shown on the chart of Captain Malcolm establish beyond question that the ship was at 6 p. m. 14 miles off shore, steering in a westward course; that she then and there encountered the United States ship of war *Tecumseh;* that at 6.30 she left the *Tecumseh* and started on a course one point north of west, upon which course she proceeded until 8 o'clock, when she was again put on her west course, which she followed until 10.10, when she was captured by the *Mayflower* 21 miles north-northwest half west from Havana light.

Also that during that time she was constantly moving at an average speed of about 7½ knots an hour, at which average speed she had been previously steaming on her course through the Old Bahama channel; that she did not alter her course except the change of one point north of west at 6.30 p. m., and again to west at 8 p. m.; that she did not between 6.30 and 10 p. m. stop or materially slacken her speed; that in the three hours and a half—from 6.30 to 10—she traversed 27½ miles (*fol.* 173), at an average rate of speed of about 7½ knots. This distance she could not have accomplished with the same number of recorded revolutions of her engine if she had deviated from her northwest course, after leaving the *Tecumseh*, when last seen by the witnesses of the captors at dusk, and had run towards Havana light on a southwest course, bringing her within 5 or 8 miles of the shore, and thence northwest to the point of capture, and that she could not have reached this point of capture in the 3½ hours if she had so deviated, even if she had run on straight lines and gone the shortest distance between those points.

It will be noted that the record of the ship's course before and after meeting the United States cruisers is from testimony of witnesses as to facts exclusively within their own

knowledge and from means of information occurring in the course of their actual daily business—facts, most of which are found recorded on the captured ship's papers, which papers were taken on board of her at 10.10 p. m. July 19 and sealed up by the prize officers, and only opened when brought before the prize commissioners and the court—most of which facts are testified to in the examinations of each of above witnesses from the *Newfoundland* taken separately and apart *in preparatorio*, and all of which facts are again testified to on examination and cross-examination on the final hearing.

It will be seen that no contradiction as to the main facts in respect to any one of said witnesses nor variance from the records of the ship's course and progress has been or can be shown.

Now, as against this unimpeached testimony which shows conclusively that the *Newfoundland* could not have "loitered" on her course between 6.30 and 8.20 p. m., and that she did not approach Havana or "loiter" off that port on the night of July 19, the suggestions, inferences, and "*approximate estimates*" of the officers of the two blockading vessels as to positions, time, or rate of speed were allowed to be set up and were accepted by the district judge as *preponderating proof*.

Superior Education and the Like.

The district judge, following the lead of the captors' suggestions and suspicions, and adopting the approximate estimates of the officers of the two United States naval vessels, finds, between the positive and precise recorded testimony of the ship and that of the witnesses for the captors, what he calls "a marked discrepancy" (*fol.* 246), and there being, in his opinion, such discrepancy, he held thus:

* * * "The first point to be decided is which is correct. Applying the usual tests by which testimony is weighed

the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds—there can be no doubt that there is a preponderance of probability in favor of that side, which having no interest in the controversy, has the greater opportunity of knowledge.

"Lieut. Evans and his mate were on cruising grounds with which they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night. They were within 3 or 4 miles of the shore with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education, character and intelligence and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

"Neither Captain Malcolm nor his mate were familiar with the locality; the former had once before been to Havana, the latter, never. Their interest is obvious—I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the *Newfoundland* within the described circle when boarded by the *Tecumseh*."

This amounts to holding that on account of their presumed superior education and character the avowedly "approximate estimates" made by the United States officers without having taken the usual "observations" by which alone the positions of ships can be accurately located upon the ocean, such "estimates" being made up after the capture *to support a theory* of the captors, should be allowed to preponderate over the daily record of the ship's log, noted hour by hour and mile by mile by an instrument mechanically accurate called the "log," corroborated by astronomical observations of the sun by day and the stars by night and corrected from time to time by observations of the land, which, together with the record of the engineer's log showing the time and speed of the vessel up to the moment of

meeting the blockading ship, determined the exact time at which the ship stopped and the time at which the engines started again, and determined, according to recognized rules of navigation, the exact position of the vessel on the ocean at that time.

Familiarity with Locality on the Ocean.

His honor, the district judge, speaks of the superior familiarity of the officers of the *Tecumseh with the locality*, as if it were a place on land and not a point on the ocean, ignoring the fact that at sea there is no landmark and no possible familiarity with the locality except from the proximity with visible points on the shore; that on the ocean, in estimating distances from land, the casual navigator, at any point of the coast, has as good opportunity of determining the exact distance from land or the locality of his ship on the ocean by the familiar rules of navigation, with the aid of Government sailing charts, as has one who has been accustomed to cruise on that particular part of the ocean, however often the latter may have passed over that particular stretch of water.

The argument of the district court decree assumes that, as Lieutenant Evans and his mate were on cruising grounds with which they were familiar, there could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night, and that, because there could be no such difficulty, it is assumed that the position from the bearing of Morro light was, as matter of fact, ascertained by them on July 19, at or before 5.15 p. m., when they started for the *Newfoundland*. These officers both admit that they did not, as matter of fact, *so ascertain* their position; that they had taken no "observation" at all, and no "bow and beam" or "point bearing" since noontime of that day, and, as we have shown above, that on the following day, July 20, after the capture, when called

upon by Commander Mackenzie, they could only give "approximate estimates" as to their probable position and that of the *Newfoundland* on the previous evening.

Superior Character.

We have nothing to say against the assumption that the officers of the United States Navy are men of superior character, but we earnestly contend that in the court-house an uneducated or unlearned witness, whose character has not been impeached or whose credibility as a witness has not been impugned, is entitled to stand on a question of preponderance of evidence on an even footing with men of the highest character. (See Sir Wm. Scott as to personal consideration and as to who is in preference to be believed. *Glierktigheit, supra.*)

Imputation of Interest.

As to the suggestion of *interest* imputed to Captain Malcolm and his mate as "obvious" (*fol.* 247), it will be noted that the only interest Captain Malcolm has in this case is that he was master of the ship on the voyage in which she was captured and the fact that he has been accused of attempting to break the blockade at Havana, which he denies.

In his testimony *in preparatorio* (*fol.* 42) he said:

"9. Yes; I was master of the ship. No; I hadn't any interest in the ship's goods or merchandise laden on her otherwise than the interest of belonging to the ship."

As to the mate, Salkus, he answered the ninth standing interrogatory *in preparatorio* thus (*fol.* 59):

"9. Yes; as chief mate. I had no interest in the vessel except my monthly wages. I got $45, and, so far as I know, the rest of the men had only the same interest."

On the question of preponderance of proof and as to the influence of "obvious interest" attributed by the district judge to Captain Malcolm and officers and crew of the *Newfoundland* to diminish the force of their testimony, while the captors are assumed to be beyond the reach of influence of interest or bias or partisanship or any other motive, we again quote Sir William Scott in the *Glierktigheit*, 6 Rob., 60:

"The imputation of direct interest is equal or perhaps stronger on the captor than on the witnesses for the captured ship."

Point Six.

The Newfoundland Was Not Legally Bound "to Account for Herself."

The district judge held (*fol.* 256) that the ship having "denied that she was there"—*i. e.*, 10 miles from Havana light—"and having failed to sustain that denial by adequate proof, and having failed to give a satisfactory account of her being in that neighborhood at all, I am compelled to condemn both ship and cargo."

When captured in the gulf of Mexico 21 miles northwest from Havana the *Newfoundland* was not taken in a position or under circumstances to warrant or suggest suspicion of hostile action or intention. She was not found going into or coming out of or *near to* a blockaded port. The utmost of offense attributed to her is that her captor *suspects* that she *had been* "loitering" during some of the hours which preceded her capture, and on that she is put by the district judge in the category of a culprit, and is required to account for herself to his satisfaction because her master and crew presumed to deny the speculative assertion of the officers of the United States Navy that she was guessed to have been 10 miles from Havana light when she passed north of it.

We contend that it was error to accept the "approximate estimates" of the United States officers as fixing the position of the *Newfoundland* at a point 10¾ miles from Havana and 5 or 8 miles from land at 6.30 p. m. and 10 miles north of Havana at 8.30 p. m. on July 19 against the positive proof of her position as testified by the ship's records and the recorded observations and corrections of her positions by the master up to that hour.

It was error to put the *Newfoundland* to her denial and to proof to sustain her denial of an assertion as to her position, which rested upon the inadequate evidence from "approximate estimates" of the captors.

It was error not to accept the ship's record as testified by the master as adequate proof to sustain her denial of the assertions as to her position.

We submit that the *Newfoundland* did not "fail to sustain her denial by adequate proof," and, having shown by the highest proof that she was on a course 17½ miles north of Havana at 8.30 p. m., we maintain that in law she was not put to the requirement of giving "a satisfactory account of her being in the neighborhood at all."

We also submit that the *Newfoundland* has given a full account of her voyage and a satisfactory account of her being where she was found at 10.10 p. m., 21 miles north-northwest half west from Havana, sailing on her west course, the continuation of a course on which she had in the main been running all through the Bahama channel and Nicholas channel, and a course which was a natural course after she left the *Tecumseh* at 6.30 p. m. for either Vera Cruz or Kingston.

Point Seven.

SUSPICION OF INTENTION CANNOT TAKE THE PLACE OF PROOF OF ACTS.

The entire case of the captors rests upon mere suspicion.

"Suspicious circumstances are not proof and cannot be raised to the dignity of evidence."
The Wren (6 Wallace, 582).

Mr. Justice NELSON:

"Now most of the proofs, relied on to disprove this evidence, are wholly inadmissible and incompetent as testimony in a court of justice. We cannot think that it needs any argument to show, that they do not rise to the character or dignity of testimony, in any court that respects the law of evidence.

"We agree, that in the facts and circumstances surrounding and attending the history and operation of this vessel, there are matters for *well-grounded suspicion and conjecture*, as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and as she entered immediately on furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unnatural and unreasonable to suspect, that the so-called Confederate States, or their agents, had some connection, if not interest in her. *But this alone is not evidence upon which to found a judgment in the administration of justice.*" * * * (*The Wren, supra.*)

The Flying Scud, 6 Wall., 265.
The Sea Witch, ib., 243.

Ch. J. MARSHALL:

"The only circumstance of suspicion * * * is that she was bound for Port au Prince and was taken entering the port of Jacmel. * * * This circumstance appears to be sufficiently accounted for. * * * Unquestionably Lieutenant Maley had a right to stop and to search the *Mercator* and to exercise his judgment on the propriety of

detaining her; but in the exercise of that judgment he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case were not sufficient to justify the seizure, which was made."

Maley vs. Shattuck, 3 Cranch, 488; *U. S. Cond. Rep.*, vol. 1, on p. 602.

CONVERTING INTENTION INTO OFFENSE.

"It is not the mere mental design which the law punishes but the overt act, in starting from or proceeding toward the prohibited port with knowledge that it is blockaded, and continuing in that course till the arrest." * * *

The John Gilpin, Blatchford Prize Cases, 659; 13 Federal Cases, 7373-'4-'5.

"But in such cases the *fact* of sailing must be *coupled with the intention*."

Fitz Simons vs. The Newport Ins. Co., 4 Cranch, 185.
The Nereide, 9 Cranch, 388.
Olivera vs. Union Ins. Co., 3 Wheat., 197.

"The modern law requires some overt act denoting the forbidden attempt in addition to the intention."

The Empress, Blatch. Pr. Cases, 175; 8 Federal Cases, p. 691.
Fitz Simons vs. The Newport Ins. Co. (*supra*).
The Columbia, 1 C. Rob., 154.

Persisting in an intention to enter a blockaded port after the warning is not attempting to enter it.

Fitz Simons vs. The Newport Ins. Co. (*supra*).

In this case there was a sentence of a foreign court condemning the ship. Discussing the correctness of the sentence, *Chief Justice Marshall* says:

"The persisting in the intention to enter the port after warning by the blockading force is the ground of the sentence.

"Is this intention (evidenced by no *fact* whatever) a breach of the blockade?

"This question is to be decided by a reference to the law of nations. * * * Neither the law of nations nor the treaty (between the United States and Great Britain) admits of the condemnation of the neutral vessels for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed that in such cases the *fact of sailing* is coupled with the *intention*, and the sentence of condemnation is founded on an *actual breach* of the blockade. Had this sentence averred that the brig *John* had broken the blockade or had attempted to enter the port of Cadiz after warning from the blockading force the cause of condemnation would have been justifiable. * * * But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but *persisting in the intention*, after being warned not to enter, is the cause of condemnation. This is not a good cause under the treaty. * * *

"It would seem, as if, aware of the excesses which might be justified *by converting intention into offense* the American negotiators (of the treaty) had required the *union of fact with intention* to constitute a breach of a blockade."

Chief Justice Marshall, speaking of the treaty between the United States and Great Britain, from which he quotes, says, "Which is accepted to be a correct exposition of the law of nations."

Fitz Simons *vs.* Newport Insurance Co., 4 Cranch, 185.

If that is the law, as to *avowed* intention, how much more imperatively must it be the law in cases of mere *suspicion of intention, inferred from circumstances?* If converting actual expressly declared intention and purpose into offense is calculated to lead to excesses in the exercise of the power of arrest, how vastly greater and more dangerous excesses will be attempted to be justified if the courts should sanction

the attempt, which is made in this case, to convert the merest "suspicion of intention" into offense?

Point Eight.

The Burden of Proof.

The Burden of Proof Rests with the Captors.

The *onus probandi* in prize causes, it will be noticed, differs widely from that which holds in revenue and other seizure cases. In revenue causes it required an express provision of statute to throw the burden of proving innocence on the "claimant," and to change the universal fundamental rule in all causes, civil or criminal, which places the burden of proof on the actor or plaintiff and on the party who assumes the affirmative in the issue, and the rule in criminal prosecutions and actions which demands of the State proof of *guilt* beyond a reasonable doubt.

Even in revenue cases it only falls upon claimant after the Government has established a *prima facie* case and shown probable cause.

Section 909 *of United States Revised Statutes* declares that "in suits or informations brought, where any seizure is made on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided*, That probable cause is shown for such prosecution, to be judged of by the court." The decisions in prize causes show that by the rules governing such courts the burden of proof of *the neutral character of the vessel or cargo* is upon the claimant, but the rule is limited to proof of neutral *ownership* or *title*, all the information as to which is presumed to be in the knowledge of claimants. No case has been found, where it extends to the proof of the acts and intention of the claimant, under the charge of violating blockade and the like, so as to require claimant, with or without previous

proof of probable cause, to prove a negative or to disprove criminal conduct or acts—in other words, to prove himself innocent.

"The *onus probandi* of *a neutral interest* rests on the claimant, but the evidence to acquit or condemn shall in the first instance come from the ship's papers and persons on board. If the *neutrality of the property* is not established finally beyond a reasonable doubt, condemnation ensues."

The Amiable Isabelle, 6 Wheat., 1.

This rule goes no further than "neutral interest" or neutrality of *the property.*

"The United States having at one time formed a competent part of the British Empire, their prize law was ours, and when we separated it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it."

30 Hds. of Sugar vs. Boyle, 9 Cranch, 191.
The Siren, p. 186.
13 *Wallace*, 389.
3 *Wharton's Digest of International Law*, § 329.

No statute of the United States ("the power which was capable of changing it") has been enacted changing the rule of prize law as administered in England on this point or extending the rule of the burden of proof beyond proof of neutral interest or property *to* that of *acts* or *intention of the claimants* alleged to be criminal.

"Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and the practice of nations."

The Amy Warwick, 2 Sprague, 123.

"In every case of a proceeding for condemnation upon captures made by the public ships of war of the United States, whether the same be cases of prize strictly *jure belli*

or upon public acts in the nature of captures *jure belli*, the proceedings are in *the name* and *authority* of the United States."

The Palmyra, 12 Wheat., 1.
3 *Wharton's Int. Digest*, p. 207, § 330.

"The question (in cases of condemnation of a vessel for breach of neutrality) is, as to *innocency* or *guilt* of the vessel, as if the transaction in which she was *implicated* was one of personal *violation* on her part."

Judge Betts in the case of *The Napoleon*, — Olcutt, 208.
3 *Wharton Int. Law Digest*, p. 20 (s. 330).

"Before property captured can be properly disposed of, it must be *condemned*, as prize, in a regular *judicial proceeding*, in which all parties interested may be heard. This proceeding must be had in a court of admiralty deciding according to the law of nations."

Benedict's Admiralty, s. 509, p. 301.

"The legality of capture is to be decided upon competent evidence and no rules are more proper for determining the competency of evidence than those which prevail in the admiralty courts."

1 *Op.*, 40 *Bradford*, 1794.
3 *Whart. Int. Law Digest*, section 330, page 200.

"It appears to be equally well settled that capture alone does not transfer any right of property to the captor the title remaining unchanged, *until a regular sentence of condemnation has been pronounced* by some court of competent jurisdiction."

3 *Whart. Int. Law Dig.*, s. 318, p. 172.

"The answer would be easily found, if the question were, what you shall do with the contraband vessel. You must take her into a convenient port and *subject her to a judicial prosecution there* in admiralty which will try, and decide, the questions of belligerency, neutrality, contraband and capture."

Mr. Seward, Sec'y of State, to Lord Lyons, Dec., 1861.
MSS. Notes, Great Britain; 3 *Wharton Int. Law Digest*, s. 328, page 173.

These citations clearly show that the judicial proceeding in prize is a *judicial prosecution* upon *a charge* of *violating neutrality* or of *violating blockade, a charge of "hostile action,"* the *penalty* for which is capture, *condemnation*, and forfeiture; that the decrees of prize courts are decrees *of condemnation*, called in the language of the authorities "*regular sentence of condemnation.*" The respondent, vessel, or cargo is dealt with as *an enemy* committing *a hostile act* against the belligerent, which the latter meets by seizure of his property and *prosecution* for *condemnation.*

This fully involves the *accusation of guilt* and the *plea of innocence;* establishes the proceeding as a prosecution of *a criminal character,* to which, by all analogies of the law and the principles and rules of evidence pertaining to criminal prosecution, must apply, such, for example, as the recognized presumption of innocence, to be overcome only by *preponderance of evidence* and the establishment of "*the proof of guilt beyond a reasonable doubt.*"

The *onus probandi*, therefore, must be held to be and to remain upon the Government, which, in alleging the thing captured to be lawful prize of war and in attempting to show a violation of blockade as *the guilty act*, which made the capture such lawful prize of war, occupies the same or an equivalent position before the court to that which it assumes in any other criminal *prosecution.*

We have not been able to find any statute rule or decision which declared the contrary to be the rule of evidence in prize causes.

In the present case we do not need to invoke for the respondents the protection of the rule in criminal cases.

The rules of evidence in civil cases as to the burden of proof are amply sufficient to sustain the claim which we assert on behalf of the respondents in the case, namely, as expressed by Mr. Greenleaf, that—

"The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue."

3 *Greenleaf*, p. 113, s. 74.

"This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. It is therefore generally deemed sufficient where the allegation is affirmative to oppose it with a bare denial. Such is the rule of the Roman law. '*Ei incumbit probatio qui dicit, non qui negat.*' As a consequence of this rule the party who asserts the affirmative of the issue is entitled to begin and reply, and having begun he is not permitted to go into half his case and reserve the remainder, but is generally obliged to develope the whole."

Ib., pages 114, 115.

"In civil cases where the plaintiff has introduced sufficient evidence to make out a *prima facie* case, he may rest upon this proof, and it becomes the duty of defendant to introduce evidence to rebut the case made by the plaintiff. The burden which is thus shifted has been called the weight of evidence."

In note (*a*).

Even in cases where the *prima facie* case has been established in proof, and the plaintiff is thereby entitled to shift the proof upon the defendant, the law is that "when the plaintiff and defendant have both put in evidence the burden of proving his whole case by *a preponderance of evidence* in civil cases is on the party who had the burden of proof in the beginning."

Powers vs. Russell, 13 Pick. (Mass.), 76; *Ib.*, note (*a*).

A *prima facie* case is not a mere suggestion of liability; it involves even in civil cases *substantial proof*, upon which, if no defensive proof is put in, the plaintiff can be said to have *proved his case*, and is entitled to a judgment in his favor upon the positive allegations of his pleadings.

In *Greenleaf*, s. 74, note *a*, cases are put which illustrate this position.

"The burden of proof is therefore fixed at the beginning of the trial by the nature of the allegations of the pleadings and it is settled as a question of law, and does not change during the course of trial."

Ib. (cases cited).

It only remains to apply the above rules to the facts of this case.

Situation of the Case.

Upon a full consideration of all the testimony *in preparatorio*, the district judge reached the following conclusion:

"Taking the testimony which alone is now before the court there is nothing in it which shows, or tends to show, that the *Newfoundland* at the time of capture or at any other time was heading for the port of Havana or any other port."

Again:

"So far as its examination has extended no case has been found where a sentence of condemnation was passed upon such a state of facts as is presented in this record. How far short the cases cited fail in showing cause for condemnation the circumstances hereinbefore recited demonstrate.

"These circumstances do no more than create a suspicion, that there was an intention to enter a Cuban port in violation of the blockade, but suspicion, however well founded, is not proof, and cannot be accepted in place of evidence.

"*There must be some overt act denoting an attempt to do the thing forbidden*, some *fact*, in addition to the *proved intention* to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution." (*U. S. vs. Newfoundland; Decree of the district court of South Carolina, filed August* 17, 1898.) *Transcript* (*fol.* 24).

We maintain that that decree contains an absolutely correct expression of the law, even if there had been proof of facts which could serve as a basis of a well-grounded "suspicion of intention" on the part of the *Newfoundland* to violate the blockade.

We claim that no such facts were shown in the testimony before the prize commissioners, and we now claim that after all the testimony on both sides has been taken that no fur-

ther or other facts have been shown which would serve as a basis even of "well-grounded suspicion" of an intention on the part of the *Newfoundland* to violate the blockade at Havana or at any other port, and that *not a single overt act has been proved or suggested in any part of the evidence.* The district judge has allowed the Government the privilege of amending the libel and of taking further proof, giving it the opportunity of proving some overt act in violation of the blockade, which, coupled with circumstances of well-grounded suspicion, would show a guilty intent and amount to an act of hostility against the United States Government, sufficient to justify a sentence of condemnation of the ship and cargo, or, at least, to excuse the marine trespass.

The widest possible range has been taken by the Government in its testimony, and as a result the matter is (as we will show) left just where it was on 17th August, 1898, to wit, as a total failure of proof and as a case of wholly unjustifiable exercise of power, without probable cause, an unmitigated marine trespass, without possible *legal* justification. What is the charge in the libel?

"That the *Newfoundland* and her cargo were captured" (an admitted fact) "and are lawful prize of war."

This is denied in the answer.

How are the vessel and cargo attempted to be shown in the evidence to be "lawful prize of war?"

What is the overt act charged?

Taking the testimony produced by the Government, was the overt act of hostility the invasion of the Government of the United States by steaming through the Old Bahama channel and the Nicholas channel and out of the latter past the straits of Florida into the waters of the gulf of Mexico? For it was actually in the latter water that the vessel was seized, at the moment of capture heading, as one Government witness said, west by north, 18 to 21 miles northwest from Havana entrance, and more than that distance, probably 25 miles at least, due north of the extreme western coast of

Cuba, and increasing that distance every moment of her progress westward. As a British vessel, a ship of a neutral power, had the *Newfoundland* or had she not the right to be where she was arrested? We will assume that this will be conceded. Had she come to that point having violated the blockade by entering into any blockaded port and was she *found coming out of* such blockaded port and overhauled after being chased while endeavoring to escape?

This is not even pretended.

Why, then, was she arrested?

Had she been anywhere where she had no lawful right to be?

Is it an offense under the law of nations to pass on a great ocean highway within *sight* of a blockading fleet of the United States Navy?

This was the utmost of her offending, as far as the testimony of the Government, stretched to its furthest limit, can be made to reach. She did not come near the cruising ground of either of the last two blockade ships. According to the estimate of her captors, she was three miles from the blockade ship of war *Mayflower* when the latter "picked up a faint light to the north of him," he being himself "six miles from the shore, near Havana entrance," and the faint light, assumed to be that of the *Newfoundland*, being thus nine miles from the shore and in an opposite direction from the *Mayflower* than was the port of Havana from the *Mayflower*—that is, far away to the northward.

As in the case of the *Tecumseh*, the *Newfoundland* was, by the Government's own showing, three miles clear to the northward of the blockading vessels. For either of them to reach her they had to leave their respective patrol cruising ground—to steam two or three miles, if not more (as we have shown), outside of its extreme circle in order to bring her in contact with them.

Even if she had been found within the limits of the cruising ground of either of those vessels, without proof of

her having come out of some blockaded port, or proof of her having tried to enter, or being taken in the act of heading for some port known to her to be blockaded, we make bold to assert that her arrest would have been wholly illegal and without excuse.

It is "an established rule of the law of maritime warfare, according to which neutral property, on board a vessel under a neutral flag, whilst on its way to another neutral port, is not liable to capture or confiscation by a belligerent as lawful prize of war; that such trade when carried on between neutral ports has, according to the law of nations, ever been held to be absolutely free." * * *

Opinion by Members of the Maritime Prize Commission, &c., 3 Wharton Int'l Dig., § 362, p. 401.

"To the eye of international law a real breach of blockade is committed only when a neutral vessel *attempts by force or stratagem to enter or leave* a blockaded port."

Bluntschli Modern International Law, § 833.

* * * "In every case the vessel can be *lawfully* captured *only while in the act of attempting to violate the blockade*" (*ib.*, § 835).

3 *Wharton Int. D.*, § 362, p. 401.

"The right to treat the vessel as an enemy is declared by Vattel to be founded on the attempt to enter." * * * (*Vattel*, b. 3, s. 117.)

Marshall, C. J., in Fitz Simons vs. Newport Ins. Co.

Point Nine.

What Things Must be Proved.

On the question of blockade three things must be *proved.*

(1.) The existence of an actual blockade.

(2.) The knowledge of the party.

(3.) Some *act* of violation, *either by going in* or *coming out* with a cargo laden after the commencement of the blockade.

Sir Wm. Scott in The Betsey (1 Ch. Rob., 92*a*).
The Mercurius (*ib.*, 82).
1 *Kent's Comm.*, * p. 144.

(1.) The Existence of an Actual Blockade.

Blockade to be Valid Must be Effective.

"Ports not effectually blockaded by a force capable of investing them have not yet been declared (by the law of nations) in a state of blockade. * * * If the effectiveness of the blockade is dispensed with, then every port of all the belligerent powers may at all times be declared in that state (of blockade) and the commerce of neutrals is thereby subjected to universal capture. But if this principle is strictly adhered to, the capacity to blockade will be limited to the naval force of the belligerent, and of consequence the mischief to neutral commerce cannot be very extensive." * * *

Mr. Marshall, Sec. of State, to Mr. King, Sep. 20, 1800; *MSS. Inst. to Ministers;* 2 Am. St. Pap. (For. Rel.), 1800.

"Mere liability by neutral vessels to capture by belligerent cruisers hovering around a coast cannot constitute a blockade of a port of such coast."

Mr. Madison, Sec. of State, to Mr. King, Sep. 20, 1800; *MSS. Inst. to Ministers;* 3 Wharton Int'l Dig., § 360, p. 369.

"No maxim of the law of nations is better established than that a blockade shall be confined to particular ports and that an adequate force shall be stationed at each port to support it. *The force should be stationary and not a cruising squadron* and placed *so near* the entrance of the harbor, or mouth of the river, as to make it *evidently* dangerous for a vessel to enter. I have to add that a vessel *entering the port* ought not to be seized, except in returning to it after being warned off by the blockading squadron stationed *near it*."

Mr. Monroe, Sec. of State, to Mr. de Onis, March 20, 1816; *MSS. Notes, For. Leg.*

Commander Mackenzie, the senior officer of the Cuba blockading force, admits that the blockade was "light" and the force not stationary (*fol.* 89).

"The blockade was pretty light. We were covering about five points of the compass on the bearing from Morro."

A Non-effective Blockade is Not Valid or Binding.

"Blockades in order to be binding must be effective; that is to say, maintained by a force sufficient to prevent access to the coast of the enemy" (*Declaration of Paris*, 1856).

"Although it is true that the United States did not sign and has not acceded to the declaration of Paris of 1856, our reserve in this respect was and has not been occasioned by any doubt as to the soundness of the rule in regard to blockades which that instrument embodies. That rule has always been regarded by this Government as the wisest, especially in the interests of neutrals, and as founded upon the texts of the public law generally received."

Mr. Evarts, Sec. of State, to Mr. Shishkin, June 12, 1877; 3 Wharton Int. Dig., § 361, p. 375.

"Only such blockades as shall be duly proclaimed and *maintained by adequate force*, in conformity to the law of nations, will be observed and respected by the United States."

Mr. Seward, Sec. of State, to Mr. Sullivan, June 13, 1867; 3 Wharton Int. Dig., p. 374.

It certainly has not been *proved* in this case that the blockade of the ports of Cuba was "effective."

Commander Mackenzie himself says (*fol.* 114):

"Take Havana—that is an *absolutely easy* place to run. Take Wilmington during the civil war, with thirty vessels at each of the entrances, and at Havana they had only 6 or 8 and no shoals, and it was an absolutely easy matter, because you have to catch the man outside.

"But if the blockade is not in the main effective—if it can be easily eluded, * * * then such blockade is *not valid*."

Wharton Com. Am. Law, § 233.
3 *Wharton Int. Dig.*, § 362, p. 405.

(2.) The Knowledge of the Party.

"The notice of a blockade must *not be more extensive* than the blockade itself, otherwise the neutral will be *at liberty to disregard* such notice, and will *not* be liable to the penalties attending a breach of blockade, for *afterwards attempting to enter the port* which is really blockaded."

The Hendrick & Maria (1 Ch. Rob., 148).

Where an officer of the blockading squadron notified the neutral merchantman that *all Dutch ports were blockaded*, whereas the blockade was confined to Amsterdam. The merchantman then attempted to get into Amsterdam and was *caught in the very act*. She was, nevertheless, restored, and the court refused to condemn her, on the ground, as said by *Sir William Scott*, that

"The notice is, I think, in point of authority illegal; at the time it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty and a commander of a king's ship is not to extend it. * * *

"The notice is also I think as illegal in effect, as in authority; it cannot be said that such a notice though bad for other ports is good for Amsterdam. It takes from the neutral all power of election as to what other ports of Hol-

land he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress, *and I am of opinion that if the neutral had contravened the notice he would not have been subject to condemnation.* * * * I think the conversation of this man was not an expression of final intention; but that of a man deliberating under difficulties in which he was *unfairly* placed. The master said 'he could not answer to his owners to go to any place but Holland.' The commander does not point out to him any ports of Holland, to which he might go, but tells him he might go to Bremen, Hamburgh, or England. * * * *I think the notice was erroneous and, besides, not broken;* and *therefore*, I restore this ship."

This case was quoted with the highest approval by the lords of the privy council in Northcote *vs.* Douglas (10 Moore, P. L., 59).

Captain Malcolm's instructions were to go to Caybairien or Sagua, if those ports were not blockaded (*fols.* 25, 155). He asked Lieutenant Titus, of the United States steamer *Badger*, "about the blockade," and was told that "*all the ports of Cuba were blockaded*" (*fol.* 27). His freedom of action was thereby at once destroyed. He "could not answer to his owner" if he did not go to Caybairien or Sagua. The commander does not point out to him any ports of Cuba to which he might go to land his cargo. According to the law as laid down by Sir William Scott, "if the neutral had contravened the notice he would not have been subject to condemnation," and if Captain Malcolm had really attempted to go to Havana (which was blockaded) the *Newfoundland* and her cargo could not be condemned.

In this case there was an additional *misrepresentation* by Lieutenant Nickerson, of the *Tecumseh*, as to the extent of the blockade of Havana itself (*fol.* 146), when Nickerson took the care to inform Malcolm that there were 30 ships of war along the westward coast of Cuba, and then admits in his testimony that there were not so many, and he knew

it. *Bona fides* is required on both sides, as well from the ship of war as from the merchantman.

See *Sir Wm. Scott in The Shepherdess* (5 Ch. Rob., 263).

(3.) Some Act of Violation, Either by Going In or Coming Out with a Cargo Laden After the Commencement of the Blockade, Must Be Proved.

See *The Betsey, The Mercurius*, 1 Kent Com. and other authorities, *supra*.

As to the Sufficiency of Proof Required After an Order for Further Proof by Plea and Proof.

In the case of *The Magnus* the cargo had been referred to further proof by "plea and proof." *Sir Wm. Scott* said:

"In this case the proof that was required was of the most solemn nature by 'plea and proof.'"

And—

"In this case therefore where proof of a more solemn nature had been ordered it could not be expected that less than ordinary proof would be received: plea and proof is an awakening thing—it admonishes the parties of the difficulties of their situation and calls for *all* the *proof* that their case can supply. * * * All proofs of a secondary nature must fail to give that satisfaction which the court is entitled to demand."

The Magnus, 1 Ch. Rob., 27.

A Case of Arrest Without Probable Cause.

The captors have wholly failed on "plea and proof" to show any overt act on the part of the *Newfoundland* to which circumstances of suspicion could be attached to make a case of intentional violation of the law of nations by her master or owners or charterers or by the owners of the cargo.

Suspicion of "loitering" based upon *inference* of more time having been consumed than it is assumed "ought to have been consumed" in passing at an assumed (not proved) rate of speed between two points on the ocean (which were not proved, but only "approximately estimated," and which were assumed in order to sustain a theory of the captors) is, we submit, not proof of an "overt act."

We have shown that the attempted inference of an undue amount of time being so consumed is unsustained by legal proof; that it rests wholly upon a mistake of fact as to the actual and possible rate of speed of the accused ship; that it is based upon erroneous assumptions as to the respective positions of the *Newfoundland*, viz., the point on the ocean where she is said to have met the *Tecumseh* at 5.35 p. m., July 19, the points where she was *supposed* to have been at 8.20 p. m. and at 8.30 p. m. and at 10.05 p. m., and upon erroneous "approximate estimations" as to the hour at which she was released by the *Tecumseh* and the distance from land and from Havana light.

We have also, we think, demonstrated that the *Newfoundland* could not, as a matter of physical possibility, have deviated between 4 p. m. and 10 10 p. m. from her westerly course through Nicolas channel in the way she must have deviated if the theory of the captors were true; that she could not have traversed the courses and distances ascribed to her in the "tracing" prepared by the captors to sustain their theory, and could not have steamed the number of miles so attributed to her at either her average rate of speed

or at the highest known rate of speed of which she was capable "in the smoothest of waters."

We have shown, we think, by the overwhelming preponderance of legal proof, that the *Newfoundland* did not, as matter of fact, at any time, deviate to the southward from the westerly course on which she had steamed through Nicolas channel between 4 o'clock and 10.10 p. m., and on which course she was found at 10 o'clock p. m. still steaming west, and that she did not at any time change her course to the south of west or in the direction of Havana.

It is admitted that there is no evidence of an attempt to enter Havana or any other port of Cuba, or of her heading for Havana or any other blockaded port at any time.

We ask, then, that the judgment of this court be that the innocent neutrals in this case were entitled to the release of the vessel and cargo on the testimony *in preparatorio*, and are now, upon the evidence and "further proof," entitled to such release, and also for their damages and costs as for an illegal arrest and detention without "*probable cause.*"

THEODORE G. BARKER,
Proctor for Respondents, Appellants.

No. 156.

NOV 6 1899
JAMES H. McKENNEY
Clerk

Reply Brf. of Barker for Appts.

Supreme Court of the United States.

OCTOBER TERM, 1899. CASE No. 156

Filed Nov. 6, 1899.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN ADMIRALTY.

In Prize.

JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON AND COMPANY, OWNERS OF THE CARGO OF SAID STEAMSHIP, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

BRIEF IN REPLY FOR THE APPELLANTS.

THEODORE G. BARKER,
G. A. R. ROWLINGS,
Counsel for Claimant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-4-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899. CASE No. 596.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN ADMIRALTY.

In Prize.

JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON AND COMPANY, OWNERS OF THE CARGO OF SAID STEAMSHIP, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

ARGUMENT IN REPLY FOR CLAIMANTS.

Since several references are made in the captors' brief to the *assumed* absence of lights on the *Newfoundland* on the evening of the capture, upon which assumption some points of the captors' argument are based, it may be expedient to quote more fully the evidence showing that the *Newfoundland's* regulation lights were burning from sunset to the time of capture.

Captain Malcolm, of *Newfoundland* (fol. 174):

Q. Were your lamps lit that night?
A. They were.
Q. And the night before?
A. They were.
Q. You will swear to that positively?
A. I will.
Q. The lights required by the Government regulations—that is, a light forward on the mast?
A. Masthead light and the two side lights.

First Mate Salkus (fol. 204):

Q. Were the regulation lights on the ship burning at that time (at time of capture)?
A. Yes; they were put out at sunset (meaning, put in place).

Second Mate Bursey (fol. 215):

Q. Whom did you relieve when you went on deck at 8 o'clock?
A. I relieved the mate.
Q. At that time were the lights lit on the vessel?
A. Yes, and burning bright.
Q. The masthead?
A. Yes.
Q. And the side light?
A. Yes.
Q. And what other lights are on the ship?
A. The binnacle lights. That is all I know about.
Q. Those lights you mentioned were lit and burning brightly?
A. Yes.
Q. Were they put out between 8, when you came on deck at any time, and 10, when the *Mayflower* captured you?
A. No; they were not put out.
Q. You are perfectly sure of that?
A. Yes; I am perfectly sure of that.

William Cody (fol. 216):

Q. What is your position and duty on the *Newfoundland?*
A. Seaman and lamp-trimmer.

Q. Have you charge of the lamps?
A. Yes.
Q. On the night of 19 July, the night you were captured, did you light the lamps?
A. Yes; and put them out.
Q. When did you light them?
A. Sunset.
Q. When did you put them out?
A. I put them out as the sun was going down. I had them lit, and was putting them out as the sun was going down.
Q. Did you put them where they belonged?
A. Yes; the masthead, and then the port light, and then the starboard light.
Q. You did that at sundown?
A. Yes.
Q. Did those lights remain burning in that position you put them in?
A. Yes; those were there burning when I came on at 12 o'clock, in the same position.
Q. When did you leave the deck after lighting the lamps?
A. After 8 o'clock.
Q. Were they burning then?
A. Yes.

Blackmore, the wheelman from 6 to 8 p. m., says (fol. 219) the ship's lamps were burning at 8, when he left the wheel.

There is *no* evidence that the lights of the *Newfoundland* were not burning. Captain Mackenzie thought they might not have been, but he admits, at folio 117, that they might have been burning and not been seen from the *Mayflower*, because the lights are only visible two points abaft the beam.

The evidence of the continuous westerly course of the *Newfoundland* along the Cuban coast, without deviation or loitering or attempting to enter any port, and of the contem-

poraneous record of the same on her chart, is also as clear and positive as that regarding the lights.

Captain Malcolm (fols. *160*, 162, 163, 166, 168, 170, 178, 189).
Mate Salkus (fols. 203, 205).
Mate Bursey (fol. 215).
Helmsman Blackmore (fol. 218).

This evidence is corroborated by—
Captain Mackenzie (fol. 110).
Lieutenant Evans (fol. 143).
Lieutenant Nickerson (fols. 147, 148).

A considerable portion of the captors' argument (*e. g.*, pp. 10 and 29 of Captors' Brief) and also of the decision below is based upon the *assumption* that the light seen by the *Mayflower* off shore at 8.20 p. m. on the evening of the capture was that of the *Newfoundland*. We reiterate that not only was it impossible for the *Mayflower* to see the lights of the *Newfoundland* at that time because she (the *Newfoundland*) was too far away—a distance of 17½ miles off shore (fol. 164), shown by the position contemporaneously marked on the *Newfoundland's* chart (fols. 160, 170) by the captain, and according to the positive evidence of the officers and crew of the *Newfoundland*—but such an *assumption* is decidedly uncertain and therefore unwarranted because of the fact that lights were often seen by the blockading squadron at night off Havana. Captain Mackenzie himself says (fols. 115, 116): "I think that night we chased something else. * * * As to chasing, we chase all the time, two or three newspaper tugs at night; spent over half a ton of coal chasing newspaper tugs and we don't get anything" (also fol. 117).

It is tolerably certain that the *Mayflower* did not then and never since has known her true position at 8.20 or 8.30 that night, for Captain Mackenzie says they were covering about five points of the compass, backwards and forwards—that is

to say, on the arc of a circle of seven miles' radius from Morro, or an arc, in this case, of about eight miles in extent, and Lieutenant Nickerson says a "big heavy set of current" running alongshore (fol. 148); and, notwithstanding the statement in the captors' brief (p. 10) that "Ensign Pratt had fixed the position of the *Mayflower* at 8.30 p. m. by taking bow and beam bearings on the Morro, which were true within a quarter to half a mile," we find that Ensign Pratt himself says (fol. 134): "A good allowance is half an hour; but I was going on to say further—I hadn't completed my answer—that I hadn't completed my bow and beam bearing. We had started to take it when I sighted this light." The true position, therefore, was never ascertained; consequently the distance of the *Newfoundland* off shore as deduced from the *Mayflower's* log and run is unreliable.

The diagrams (and the distances and courses marked thereon) used by the captors are equally uncertain, owing to the fact that they were made the day following the capture, and were not contemporaneous records, but rather the result of estimations or guesses and theory (Captain Mackenzie, fol. 93; Lieutenant Culver, fol. 125; Ensign Pratt, fol. 134; Lieutenant Evans, fol. 143, and Mate Nickerson, fol. 148).

The principal contention of the captors is that the *Newfoundland* "loitered" (Captors' Brief, p. 30) after 5.35 p. m. on July 19.

Now, it has been conclusively demonstrated, we submit, in the claimants' brief, that the time of departure of the *Newfoundland* from the *Tecumseh* was 6.30 p. m. or even later, because, aside from the fact that the officers of the *Newfoundland* carefully noted the time at which the *Tecumseh* left them, it seems settled beyond question, from the evidence of Mate Nickerson, of the *Tecumseh*, alone, when he says he could only see the *Newfoundland* for ten minutes after she left the *Tecumseh*, because "dusk settled down then"

(fol. 148), that the departure must have been after sunset—6.37 p. m. (fols. 204, 127)—and probably nearly 7 o'clock. Allowing the *Newfoundland* 10 or 15 minutes to get up speed again, she thus, in this evidence alone, to say nothing of the positive testimony of her officers that there was no loitering (fols. 222, 228), borne out by the fact that her run from her noon position, which is not attempted to be disputed, to her point of capture at her full known speed, must necessarily have been made without any more delay than was caused by the *Tecumseh*, and in a straight line, fully accounts for the ten-mile run, or the time equivalent for the *Newfoundland* of something over one and a quarter hours at a speed of 7⅓ miles per hour, for which Captain Mackenzie, at folio 114, says he considers she must account. Again, on reference to the chart it is seen that at the *proved* rate of speed of the *Newfoundland* (7⅓ miles per hour) she had all she could do to get from the point where the *Tecumseh* met her to the point of capture in a straight line (a distance of 27 miles) in the three and one-half hours between 6.30 and 10 p. m. without any delay by loitering. If she zigzagged (as is also contended), still less is it possible that she loitered. If she loitered, she had no time to zigzag. The captors cannot blow both hot and cold, but they attempt to do so in order to sustain their surmises and theory as to courses and distances.

Neither can the captors claim that their "estimate" of the *place* of boarding by the *Tecumseh* (made on the following day on an open sea without a contemporaneously recorded observation, folios 143, 148) can be depended upon, when the log of the *Tecumseh* as to the *time* of boarding, made at the time, is manifestly incorrect. Captain Malcolm, on the other hand, put down his positions on the chart contemporaneously (fols. 152, 160, 170), showing the place of boarding by the *Tecumseh* about 14 miles off shore.

At page 29 of captors' brief we find it stated that "it is just possible, as stated by Captain Mackenzie, that the *Mayflower*

alone, and not the *Newfoundland*, was repeatedly changing her course; but this does not appear very likely from the *Mayflower's* log." A perusal of that log (fol. 235), however, shows at once that the *Mayflower* did zigzag from a northwest course to a southwest course and *vice versa* more than once. (See Lieutenant Pratt's testimony, pp. 76, 77 of transcript.) The *Newfoundland*, on the other hand, we submit, is shown by the evidence to have been pursuing a due west course at the rate of 7⅓ miles per hour, across the wake of which course the *Mayflower* evidently was seesawing at the high rate of speed of 16 knots. This is the reason why it took the *Mayflower* a considerable time to come up to the *Newfoundland* and why Captain Mackenzie was surprised when Captain Malcolm told him that the *Newfoundland* had been traveling only at about 8 knots per hour (fol. 176).

The "*theory*" of Commander Mackenzie (fol. 90, p. 50), of Lieutenant Culver (fol. 120, p. 67, and fol. 123, p. 69), and of the circuit judge's decree (fol. 244, p. 138) rests upon the assumption that the "faint light" seen at 8.20 p. m. from the *Mayflower* was the light of "a plain lantern" hanging in the companionway of the *Newfoundland*, "reported *N.* by *W.* from 2 to 3 miles away."

Lieutenant Pratt thought that such a lantern hung in the companionway or "after deck-house" of the *Newfoundland* could be seen from a point "abeam on east side" or "pretty nearly abeam" (p. 74, fol. 132); but against this we have the positive and precise testimony of Captain Malcolm, master, and of Salkus, mate, of the *Newfoundland*, showing that a lantern hanging as the lantern in the companionway of the *Newfoundland* hung would not be visible from a point "abeam," but would only be visible between the bearings, 4¼ points and 5 points *abaft the* beam (*Malcolm's testimony*, p. 99, fol. 176, and *Salkus*, p. 116, fol. 204, 205).

The measurements of the after deck-house and bearings of the light through the doors in the after house or companionway were taken by the mate *Salkus* while the *New-*

foundland was in the port of Charleston in the custody of the United States marshal and while the testimony in the case was being taken, and these measurements and bearings were so taken to enable him to say at what points of the compass that light would be visible through those doors.

It was in the power of the captors to have refuted this testimony by an examination of the after house or companionway and by testimony to contradict it if it had been incorrect. No such attempt was made. It must therefore be held to have been proved, as stated by the master and mate.

If, then, such a lantern so hung in the companionway of the *Newfoundland* could *only* be visible to an outsider from a point 4¼ or from a point 5 points abaft the beam and the intermediate points between those bearings, it follows, mathematically, that it could not have been seen on the *Newfoundland* when she was west by north—that is to say, *one* point west of north from the *Mayflower*. It could only have been seen when she was 4¼ to 5 points west of north from the observer. It follows, therefore, indisputably, that the "faint light" seen at 8.20 by Lieutenant Pratt from the *Mayflower* 2 or 3 miles off north by west could not have been the lantern of the *Newfoundland*, and that the circuit judge was clearly in error in saying (p. 138, fol. 244): "It is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the *Newfoundland*."

This, again, goes to corroborate the proof from the officers of the *Newfoundland* that she was 17½ miles away and out of sight from the *Mayflower* at 8.20 or 8.30 p. m.

In the log of the *Mayflower* it is stated that the light seen by her during her run was seen first on one beam and then on the other, as if extinguished at intervals; but, as a matter of fact, it was shown on the hearing that the deck-house of the *Newfoundland* had a narrow doorway on each side, and suspended to the roof of this house a lantern was hanging

during the evening. The *Mayflower*, drawn from the squadron by some stray light, "opened" this light, if the *Newfoundland's*, first through the port doorway of the *Newfoundland* and headed for it on a northwest course—that is, in a direction diagonally across the wake of the *Newfoundland*. The light, of course, was lost to view as soon as the *Newfoundland* had drawn sufficiently far away in her westward straight course so as to close to the view of the *Mayflower* the doorway through which the lantern shone. The light would not be disclosed again on account of there not being any opening in rear end of deck-house until the *Mayflower* had overrun the wake of the *Newfoundland* sufficiently far to open the light through the starboard doorway of the *Newfoundland's* deck-house. The *Mayflower* then headed for it again on a southwest course. It was shortly lost again to her view until she again opened it through the port doorway of the *Newfoundland's* house. (See decision below, fol. 244.)

The captors are therefore wrong in saying it is not likely that the *Mayflower* repeatedly changed her course.

The captors say (at p. 23 of their brief) that "the master (of the *Newfoundland*), at all events, thought, as the officers of the *Badger* thought, that there was a blockade at Sagua and Caibarien, and therefore it is not quite true that the master might well have gone to either of these ports for the purpose of testing the validity of the supposed blockade, which the court below appears to think." In this statement the captors agree with the claimants as to the cause of Captain Malcolm's perplexity at this point. The captain before leaving Halifax had been told by the owners that the ports of Sagua and Caibarien were open ports, and had been furnished with a map (in evidence) showing these ports as open ports. He was confronted with a sudden and direct contradiction, and naturally felt that these American officers, who were on the spot, must certainly be right as to the blockade, and if he disclosed to them that he had sailed for ports that were actually blockaded and asked that he might

be permitted to turn back from his westward course he would quite probably subject himself to suspicion grave enough to be instantly seized and sent into port for adjudication. At the least, he had no assurance that such would not be the case, so he kept right on, on his westward course with the idea that that was his only safe course. The district court thought the captain might have safely gone into these ports. Captain Malcolm did not think so, and at folio 229 incidentally explains why not. He says: "The boarding officer of the *Badger*, Lieutenant Titus, told me the only light I would see lit on the Cuban coast from that point until I got to Havana would be Key Francis, which he said had been taken by the Americans, and the light Key Francis is at the entrance of Caibarien. I saw I was going to pass that light before dark, and I felt if I could have seen that light lit it would have eased me in the position I was in, and I slowed the ship and went aloft, and I saw the light of Key Francis. After I saw it I proceeded again. That is the reason I slowed the ship down that particular time." If, therefore, he had any remote intention of trying to enter these ports after leaving the *Badger* he was convinced by seeing the light at Key Francis that in doing so he would thereby run into the hands of the American authorities, who had possession of these ports, as he was led to believe through the erroneous information he had received, and the cargo, entrusted to his care, would fall into other hands than those of the consignees. Having come to this point of the coast, he could not go back over his course now and meet the officers of the *Badger*, who, he then felt sure, had correctly informed him as to the blockade, but made up his mind to get to Kingston "and telegraph for orders." He could also satisfy his owners that he had passed these ports. In this connection it might also be observed that in his examination at Charleston, although he had been found on a westward course along the coast of Cuba, Captain Malcolm stated that he was going to Kings-

ton instead of the port of Vera Cruz, directly ahead of him, which, in the case of a dishonest man bent on giving the most plausible explanation, would have been the probable story, and would have got rid of any difficulty about a circuitous route to Kingston. Such testimony, we submit, points unerringly to the truthfulness and reliability of Captain Malcolm's whole evidence. It is noticeable also that Captain Malcolm did not slacken speed on his voyage after leaving Sagua in order to reach the vicinity of Havana in the dead of night, but was in sight of squadron before sunset and well past Havana at 10 o'clock that evening, when he was seized.

At page 21 of the captors' brief it is said: "The vessel proceeds from Halifax cleared for an alternative destination, an unusual clearance, which seems to be customarily allowed under Canadian regulations when a vessel clears domestic as a subsidized mail boat, proceeding to other domestic ports; but this was a foreign clearance."

We submit that the evidence does not show that this practice is confined to mail boats or domestic ports (fol. 164); neither is the practice unusual or confined to Canadian custom-houses. The court below says: "Commander Mackenzie testifies that it is not the practice of any American custom-house to give two clearances. Captain Malcolm says that this is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had *cargo* for each. We have no statute prescribing any regulations on this subject, and whenever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port (Charleston) to give such separate clearances. * * * For reasons into which it is not the province of this court to inquire, neither Sagua nor Caibarien were included among the ports blockaded under the proclamation of the President and he had the right to go to either. Whether

in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry; certain it is that he would have committed no offense cognizable here."

In the case of *The Rising Sun* (2 C. Rob., 105) Sir William Scott says:

"The destination is very inaccurately expressed; some of the papers describing it to have been Charleston, others to Altaia, whereas the true destination was to Guernsey, but as they are both neutral ports, I do not think there is much in that, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port."

From *The Watchful* (6 Wall., 93) we quote:

"The record as it stands shews that the vessel cleared for Hamburg, when her destination was certainly Matamoras, Mexico; that her clearance was probably altered after she was at sea by writing over the word Hamburg the word Matamoras; that a false manifest was used, and the fact of the main cargo of 252 cases of arms being on board was carefully concealed from the officers of the customs at New York, from which port she sailed. * * *

"It is very clear that there is no case of prize made out by the evidence. The property, which was undoubtedly Wallis's, was therefore not enemy's property, nor is there any evidence of intention to break the blockade or to trade with the enemy. The case is so destitute of all elements of prize that the present libel was properly dismissed."

Similarly, no importance can be attached to the manner of the *Newfoundland's* clearance. It must be evident that the owners, being business men, thought that if she publicly cleared for Sagua or Caibarien, it would become immediately known to the American consul at Halifax, whose duty it probably was to report vessels bound to Cuba, and it would not be long before the fact would be communicated by telegraph to the American Government, and

on the arrival of the *Newfoundland* at Sagua she might have found a ship of war with authority to state to her that the port was under blockade, and thus not only this, but future voyages to Sagua would be interrupted.

In the instructions to blockading vessels drawn up for the war with Spain the following paragraph countenances alternative destinations:

6. A neutral vessel may sail in good faith for a blockaded port, with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an international port . . . (Snow Int. Law, 153).

The captors' contention (p. 21 of their brief), that there was a blockade *de facto* along the whole coast of Cuba, is both new and unsustainable. It is not shown that the *Badger* had the slightest authority to declare a blockade, or that such a blockade did in fact exist, and the burden of proof of the existence of a blockade *de facto* is on the captors (Wharton's International Law, vol. III, p. 362). Moreover, there was no violation of any such blockade by the *Newfoundland*, if it ever did exist. Again, it cannot be said that two small tugs, the *Badger* and *Hudson*, on the long coast line of Cuba between Cape Maisi and Havana can constitute an effective blockade according to American or English ideas of blockade, either *de jure* or *de facto*.

"Although the commerce of the United States has been to a greater extent than any other a victim of those gigantic abuses of power it has never suffered without just complaints in individual cases and constant and strong remonstrance on the part of the government of the said States against the principle and practice of everything like an imaginary blockade, the hydra of lawless oppression.

"Thus it has ever been maintained by the United States that a proclamation or ideal blockade of an extensive coast not supported by the actual presence of a naval power competent to enforce its simultaneous, constant and effective operation on every point of such coast is illegal *throughout*

its whole extent, even for the ports which may be in actual blockade. This is in general terms one of the fundamental rules of the law of blockade as professed and practiced by the Government of the United States" (*Mr. Marshall, Sec. of State, to Mr. King, 20th Sept., 1800; 2 Am. State Papers, 488.* See also *Roberts on Admiralty and Prize, 492*).

The Guantanamo incident mentioned in captors' brief is fully explained, at folio 67, by an eye-witness, Mate Salkus, as follows:

"On the last voyage we sailed in Guantanamo, but we were told the place was blockaded, and we left. It was taken the morning before by the United States, we were told by the visiting officers of the U. S. men-of-war; that was last month, in June, on the previous voyage. We heard of the Guantanamo blockade the day we arrived, but we were not warned, and had seen nobody before such time to tell us not to enter such port. I could not say about the conversation; the officer only told us the place was taken the morning before and we could not proceed up the bay. Captain Farquhar, then master of the ship, then said he had a cargo of sugar, and they said he could not get it out under the Spanish flag, but we might get it out under the American; that was at Guantanamo. We went out then and proceeded to Porto Rico."

WANT OF PROBABLE CAUSE.

The doctrine of probable cause is comprehensively dealt with in the case of *Schacht vs. Otter* (10 M. P. C. C., 163):

"Neither in the texts, nor in the decided cases to which we have thus referred, do we find it stated that in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause, after she has been searched) or that honest mistake, tho' occasioned by the act of the government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral (and with this case alone we are dealing) the damage which, by their conduct, he has sustained.

"Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest.

"If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight, but the principle on which they are awarded is that of affording compensation to a party who has been injured.

"So as to error occasioned by the proceedings of their own government.

"The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize courts afford the remedy as between the individuals, which otherwise must be sought by the government of the claimants against the government of the captors; but the mode of proceeding cannot affect the right to redress, and if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so.

"The law of nations upon these points appears to us to be settled by decisions both in the American and European courts. * * * The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages.

"* * * Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, he has not, by any conduct, contributed to the loss."

(In this case no sea letter describing and identifying the ship was amongst the documents produced.)

"By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong, &c.

"* * * We have been guided to the conclusion at which we have arrived by what we consider to be established principles. They appear to us to be founded both in justice and convenience, reconciling, as far as possible (what it is very difficult to reconcile) the conflicting rights of belligerents

and neutrals. We have adopted them, however, not upon any views of our own, but because we consider them to have been recognized and acted upon by the general consent of nations."

We further submit the fact, in the consideration of this subject and of damages, that had it not been for the erroneous information got from the *Badger* the *Newfoundland* would never have been in the vicinity of Havana or have come in contact with the *Mayflower* at all.

As to measure of damages, see Phillimore's Int. Law, vol. III, p. 698.

THE AUTHORITIES.

According to the authorities the ship and cargo should be restored with damages and costs. In summing up the evidence the judge below (fol. 246) says:

"There is marked discrepancy, and the first point to be decided is which is correct. Applying the usual tests by which testimony is weighed, the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds there can be no doubt that there is a preponderance of probability in favor of that side which having no interest in the controversy has the greater opportunity of knowledge."

Sir William Scott, in dealing with the same difficulty in "*The Haabet*" (6 C. Rob., 58), observes:

"Which should the court believe? Can it be maintained that the preference should be given to the captors, and that in opposition to the general rule, which has given the preference the other way, and which directs that the property of the neutral claimant shall not be condemned except on evidence coming out of his own mouth or arising out of the circumstances of the transaction. If the rule is unsatisfactory to captors it is nevertheless the rule which the law prescribes. It is my duty to take care that the rules of law

are observed and that the rights of war are not exceeded, and certainly in no cases more than in this particular branch of nations which must in its nature operate with severe restraint upon neutral commerce."

Roberts on Admiralty and Prize:

"Three things favor the restitution of captured property claimed by neutrals.

(1.) A *presumption* of innocent neutral intentions as to the blockade.

(2.) Proof of fair and not fraudulent conduct on the part of a neutral claimant.

"In the case of '*The Lively*' (1 Gall., 317) the reasons assigned by the captors for the capture were that the schooner was not truly described in her enrollment and license, and from some other appearances on the face of the papers he suspected them to be forged. Another reason assigned was that when hailed the master answered that he was bound to Machias and afterwards said he was bound to Eastport. Another reason was the conduct of the schooner which Captain Downey (the captor) thought indicated a design to trade with the enemy."

STORY, *J.*:

"It has been contended upon the facts in this case that there was probable cause for capture, but I am perfectly satisfied that there was no such cause."

The Wren (6 Wallace, 582): "In this case the vessel had previously run the blockade at Galveston. One of the crew had heard from a former captain of the ship that she belonged to the Confederacy. A Confederate agent at Havana had appointed a master to take charge of the vessel. The purser heard the ship's agent say that she was owned by a firm one of whose members was a citizen of the Confederacy."

NELSON, *J.*:

"Now most of the proofs relied on * * * are incompetent as testimony in a court of justice; we cannot think that it needs any argument to show that they do not rise to

the character or dignity of testimony in any court that respects the law of evidence.

"We agree that in the facts and circumstances surrounding and attending the history and operations of this vessel and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture as it respects the purpose and intent with which the vessel was originally built and sent to Havana, and as she entered immediately in furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unnatural or unreasonable to suspect that the so-called Confederate States or their agents had some connection, if not some interest, in her. But this alone is not evidence upon which to found a judgment in the administration of justice. The fact the master, Stiles, who was put in command of her for the voyage home from Havana to Liverpool was an officer of the enemy's naval service, and had belonged to the U. S. Navy, and Helms, who was in some way not explained connected with her voyages in running the blockade and who was the agent of the enemy at Havana might well be entitled to consideration and weight on the question if there had been any legal proof in the case laying a foundation for such a conclusion; so also would the evidence that Stiles destroyed at the time of capture, a letter from Helms, agent of the ship as he calls him, to himself. * * * But in the view we have taken of the case there is no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest or be attached as auxiliary considerations to influence the judgment of a court."

Decree of district court reversed and vessel restored.

"*The Flying Scud*" (6 Wallace, 263):

"A British ship left Nassau in January, 1863, laden with a cargo of timber, tin, iron, powder, and horseshoes and was destined ostensibly for Matamoras, Mexico (a place separated from Texas and the commercial town of Brownsville in it only by the dividing river, the Rio Grande). She arrived at Matamoras at the mouth of the Rio Grande (where on account of a bar vessels of any size are obliged to anchor), on the 1st of March. After remaining there for a week or ten days she sailed for Brazos, Santiago, a port in Texas about

nine miles from the mouth of the Rio Grande, where her cargo was discharged and carried to Point Isabelle, also in Texas. The vessel remained at Santiago till some time in May, when she returned to the mouth of the Rio Grande. While here in July she was chartered by a Spanish subject, a merchant in Matamoras, to carry a cargo of cotton from Matamoras to Havana. *Claimed for cargo.*

"It was contended that a person carrying on trade in time of war in a region so exceedingly suspicious as from its geographical character was the Rio Grande must show a case above all suspicion, and the outward voyage which undoubtedly was meant for Texas and was criminal involves the present one in grave suspicion."

NELSON, *J.*, held:

"The transaction (*re* cotton cargo) appears free from all doubt or obscurity. * * * The argument therefore founded on the suspicion that the claimants were connected with the breach at Brazos is without any foundation."

"*The Sea Witch*" (6 Wallace, 242), a neutral vessel with a neutral cargo, cleared from Vera Cruz for New Orleans (then open to trade), but at the time of capture she was out of the ordinary and most direct line of a voyage from Vera Cruz to New Orleans and somewhat along the coast and in a position to go to Galveston, Texas, then blockaded.

CHASE, *C. J.*:

"The only ground of suspicion, that a violation of the blockade was intended was the fact that the vessel when captured was out of the most direct regular course to New Orleans, and in a part of the Gulf where she would very probably have been had her real destination been Galveston. But we think this is sufficiently accounted for by the weather and by the probability that such a vessel really bound for New Orleans would prefer to keep at no greater distance from the shore than the blockade would require rather than take the more direct course across the Gulf."

"*The Pizarro*" (2 Wheaton 91), Story, *J.*:

"In this case there has been a gross prevarication and suppression of testimony by master and supercargo. Nothing can be more loose and unsatisfactory than their first examination, and the new and circumstantial details given upon their second examination are inconsistent with the notion of perfect good faith in the first instance. The excuse, too, for throwing a packet of papers overboard is certainly not easily to be credited. * * * If indeed upon the original evidence the cause should appear extremely doubtful or suspicious and further proof should be necessary, the grant or denial of it would rest upon the same general principles which govern the discretion of prize courts in other cases; but in the present case there is no necessity for such further proof, since the documents and testimony now before us are in our opinion as to the proprietary interest in the ship entirely equivalent to the passport and seal letter required by the treaty."

Ship and cargo restored.

"The *Sir William Peel* (5 Wallace, 517 536). The cargo consisted in part of powder, cartridges, pistols, cutlasses, etc., and it was testified that the consignees, Milmo & Co., Matamoras, had the general reputation of being the agents of the confederacy; that they had a branch-house in Brownsville, nearly opposite, in Texas, and were engaged in receiving cargo from Europe, which they disposed of to the military authorities of the confederacy, receiving and lading, in return, cotton, which the confederacy had seized and over which it exercised the right of property. Moreover, no papers were found on board."

CHASE, *C. J.*:

"There is some evidence which justifies suspicion. Several witnesses state facts which tend to prove that the *Peel* was in the employment of the rebel government, and that part of the cotton laden upon her as return cargo was in fact rebel property.

"There are statements, on the other hand, which make it probable that the *Peel* was in truth, what she professed to be, a merchant steamer belonging to neutral merchants and

nothing more; that her cargo was consigned in good faith by neutral owners for sale at Matamoras, or to be conveyed across the river and sold in Texas, as it might lawfully be, not being contraband; that the cotton was purchased by neutrals and on neutral account with the proceeds of the cargo or other money. In this conflict of evidence we do not think ourselves warranted in condemning." * * *

Fitzsimmons vs. Newport Ins. Co. (4 Cranch, 67), Marshall, C. J.:

"This treaty (between U. S. and G. B.) is conceived to be a correct exposition of the law of nations. * * * It is impossible to read that instrument without perceiving a clear intention in the parties to it that after notice of the blockade an attempt to enter the port must be made in order to subject the vessel to confiscation. * * * These words strongly import a stipulation that there shall be a free agency on the part of the commander of a vessel after receiving notice of a blockade, and that there shall be no detention nor condemnation unless in the exercise of that free agency a second attempt to enter the invested place shall be made. * * * The commander of the blockading squadron, * * * availing himself of some equivocal, unguarded, and perhaps indiscreet answer on the part of the captain, the vessel was sent in for adjudication, and on these expressions was condemned.

Judgment of circuit court reversed with costs.

NOTE.—1st. The words are not that in the exercise of that free agency he "must not subject himself to suspicion," as claimed by the judge below.

2d. Far from any attempt on the part of the *Newfoundland* to enter a blockaded port, it is merely suggested in a very indefinite manner that she loitered; and, moreover, Commander Mackenzie did not dream of the loitering theory until after the capture. At the time of the capture Captain Mackenzie not only did not know of any attempt to enter

and did not know of any loitering, but found the vessel on her westward course.

In the case of *The Madonna* (4 C. Rob., 169) there was "vehement suspicion" as to the cargo being enemy's property, and also on account of the spoliation of some papers. It is only fair to say that in this case the captors were greatly blamed for delaying to bring the matter promptly into the prize court, three or four months being made in doing so. The property, notwithstanding "vehement suspicion" and spoliation of papers, was restored, with demurrage and compensation.

"*The Science*" (6 Wall., 178), Chase, C. J.:

"Some of the proof tended to show that a portion of the cargo consisted of Confederate uniform cloth, but there was none showing destination to enemy's territory or immediate enemy use. There was therefore nothing in the character of the vessel or of the outward cargo which warranted condemnation."

"*The Volant*" (6 Wall., 179), Chase, C. J.:

"The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at time of capture.

"It consisted in part of bales of Confederate uniform cloth, of the same mark and corresponding numbers with like goods found on the *Science*, but there is no proof of unlawful destination. The brig, however, anchored in Texan waters near the coast, and remained there until captured.

"This circumstance alone did not warrant condemnation."

From the above we submit that there was no probable cause for seizure, because:

1. Hearsay reports are not to be taken as a cause for seizure.

2. The matter of clearances is at most only a breach of municipal law.

3. The reasons given by Captain Mackenzie were not known to him at the time of capture, and did not, in any event, warrant a seizure.

The *Newfoundland* had all her "ship's papers" on board at time of capture.

According to law of *United States* these are:

Certificate of registry.
Sea letter or certificate of ownership.
Ship's log book.
National flag.
Charter-party (if vessel is chartered).
Manifest of cargo.
Custom-house clearance.
Bills of lading.
Shipping articles.
Muster-roll.
Bill of health.

(See Lushington's Naval Prize Law, 33.)

According to law of Great Britain the list is practically the same.

(See Lushington's Naval Prize Law, 30.)

We respectfully submit the question to the court and ask for a reversal of the decree below, with costs, and damages as for seizure of a neutral merchant ship without probable cause.

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G. A. R. ROWLINGS,
Counsel for Claimants.

STATEMENT.

This prize case involves intention and preparation to violate a blockade, and attempt (per se) by "loitering." The vessel of 557 tons, with a general cargo on board, was seized by the U. S. S. *Mayflower* on the high seas on July 19, 1898, and was taken into the port of Charleston, district of South Carolina, for adjudication. The owner of the vessel and the cargo claimants filed claims and test affidavits in the form of answers to the libel, setting up formal denials on their own knowledge, or on information and belief derived from the master and the charterers, of intention or attempt to violate the blockade, or that the vessel and cargo were lawful prize. The vessel owner alleged a stipulation of the charter party that the ship should engage only in lawful trade between Nova Scotia and ports of other countries, and an instruction and warning to the master not to attempt to take her into any blockaded port, and the claimants of the cargo alleged instructions to the master to clear the cargo for Kingston, Jamaica, and Vera Cruz, Mexico, but to enter and land the same at Caibarien or Sagua la Grande, Cuba, provided either of those ports was not found to be under blockade; otherwise to convey the cargo to Kingston, Jamaica, and there await orders. (Rec., pp. 4–7.) The depositions *in preparatorio* of the master (p. 22), the chief mate (p. 33), the second mate (p. 38), and the sailor before

the mast (p. 44) showed that the vessel and claimants were British; that the seizure was made about 10 p. m. on July 19, 1898, 21 miles close to northwest from Havana light, at least 13 or 14 miles offshore (pp. 23, 35); that the ship was chartered for a three months' voyage, beginning and ending at Halifax, whence she sailed July 9, carrying a general cargo, which was laden during the latter part of June and the early part of July, consisting of flour, canned goods, and other provisions; that the shippers' instructions were to proceed with all haste, clear for Kingston and Vera Cruz, but to enter the port of Sagua or Caibarien on the north coast of Cuba, as alleged by the claimants; that the charter provided for trade between ports of Canada, the United States, and the West Indies, including open Cuban ports, no contraband to be carried, the charterer to insure against capture. The deponents did not know the names of the consignees or for whose real account, risk, or benefit the goods were to be delivered, or whether the laders were to take the chance of the market for sale.

While proceeding westward along the northern coast of Cuba the vessel was boarded off Nuevitas by an officer of the U. S. S. *Badger*, and the master warned of the blockade and the register indorsed. Subsequently an officer from the *Hudson* boarded and examined the register, and at 6 o'clock on the evening of capture the vessel was boarded by an officer from the *Tecumseh*, to the eastward of Havana, who warned the master not to come any farther in shore, and indorsed the mate's log book to this effect. The deponents alleged that the ship had been steering her course for Kingston without alteration, ex-

cept for safe navigation, and not toward any other port until captured, allowing for the endeavor to follow out the instructions to deliver at Sagua or Caibarien if not blockaded; that upon warning by the *Tecumseh* the course was pointed off shore, but that at 8 o'clock p. m. she returned to her former course, due west. It is to be noted that while the deponents *in preparatorio* testified, generally, that the vessel's destination was Kingston *or* Vera Cruz, the captain testified (p. 28): "She was steering her course towards Kingston. The course was not altered after we saw the ship until we stopped our engines." (p. 29): "I believe the true destination was Kingston, Jamaica;" while the witness Bursey, the second mate, testified (p. 42): "As far as I know her course was always directed towards Vera Cruz," although the same witness associated Vera Cruz and Kingston in other statements of her destination; while the sailor, Shawner, says (p. 47) that he doesn't know what port in particular she was bound for; and the chief mate, Salkus, says (pp. 36, 37), also associating Vera Cruz and Kingston as the destination in other sentences: "We were steering our course for Vera Cruz. * * * Her course was not altered for any port except Vera Cruz. That was the only course she steered. I never heard of any other port than Vera Cruz from the time I left Halifax till we were captured."

All the deponents denied any attempt to enter a blockaded port. It was admitted that the *Newfoundland* had been turned back at Guantanamo in June, and the master testified that a Bermuda newspaper said (p. 31) that a shot had been fired across her bow at that time, to which

she paid no attention. He was not in command then, when the managing owner and claimant here appears to have been in command.

The sailor examined testified (pp. 46, 48) that he had heard from the crew, which he joined at Halifax on July 4, that the vessel had run the blockade before; that it was common report in Halifax.

The cause then came on to be heard on the proof *in preparatorio*, and by decree of August 15 (p. 8) further proof was ordered and the libel amended by striking out the words "in attempting to violate the blockade," etc. (pp. 1, 8, 15). Amended answers were filed thereto, claiming that the amended libel set forth no cause of action and presented no issue which the claimants could meet by plea or answer, and, as stating a mere conclusion of law, was wholly insufficient, whereupon the court, in an opinion filed August 17 (pp. 9–15), restated the order of August 15, allowing further proof to both parties and permitting the discharge of the vessel on stipulation for value. The cargo was subsequently sold (p. 146). Exceptions to the decrees of August 15 and August 17, based upon the claims in the answers to the amended libel, were overruled by the court.

FURTHER PROOF.

On behalf of the Government the following witnesses were examined: Captain Mackenzie (pp. 50–66), Lieutenant Culver, navigating officer (pp. 66–72), and Ensign Pratt (pp. 72–78), all of the *Mayflower;* Lieutenant Evans, commanding the *Tecumseh* (pp. 78–81), and Executive Officer Nickerson, of the *Tecumseh* (pp. 81–83), of whom

Lieutenant Pratt was recalled in reply (p. 131); and on behalf of the claimants the deponents *in preparatorio* were recalled (master, pp. 112–113, 130; chief mate, pp. 114–121; second mate, pp. 121–122; Seaman Shawner, p. 123), and two more seamen (pp. 123–124) with the chief engineer of the *Newfoundland* (pp. 125–130).

An extract from the log of the *Mayflower*, covering the period from 8 p. m. until midnight on July 19, is given on pages 133–4, and on the latter page is a memorandum attached to the chart in evidence in the case, which chart is reproduced as one of the frontispieces to this brief.

The main conflict in the evidence relates to the movements of the *Newfoundland* on the evening in question and to its position at successive times.

The Government testimony is to the following effect: The *Mayflower* was on blockade duty off Havana, and on the night of July 19 was covering about five points of the compass on bearings from the Morro, ranging from S. SW. to SE. by S. and back again. When she was N. by E. of the Morro light, about 8.30 p. m., a faint light like a plain lantern without any lens and not shining steadily was reported N. by W. from 2 to 3 miles away, the *Mayflower* then lying about 7 miles from the Morro, which bore a little W. of S. The *Mayflower* immediately stood for the light at full steam and under forced draft, going soon at the rate of 16 knots. She stood on about N. by W. or N. NW. (pp. 50, 67), lost the light and picked it up again several times, now on the port and again on the starboard beam, the night not being dark. During the chase no light but the faint one was seen on the *Newfoundland* (p. 50), not even the masthead light (p. 53).

It seems that besides the regular lights it is very unusual in ordinary times for a ship not to show stray lights—lights through the air ports, the cabin, and other places (id.). The running lights should have been sighted before the chase if the *Newfoundland* had pursued a direct course after being warned by the *Tecumseh*. (See also pp. 60, 64, 65 for the certainty of the officers of the *Mayflower* about the absence of lights.) The prize was overhauled at 10 p. m., and brought to promptly when the blank charge was fired. The *Newfoundland's* position at 8.30, by her log, and the *Mayflower's* position at the same time, relative to the Morro, agreed almost exactly, the former giving it as north of the Morro, and the latter N. ½ W., the *Newfoundland* log reading (p. 64), "8.30, Havana light bearing S. 10 miles." From 5.30 p. m., when boarded by the *Tecumseh* (or 6 p. m., according to the *Newfoundland's* time), to 8.30, when sighted by the *Mayflower*, the *Newfoundland* only made 12 miles, even if she is given the benefit of the farthest point of the circle which the *Tecumseh* was covering as her starting point, or about 5 miles if the *Tecumseh's* nearest point is taken; and the *Tecumseh* boarded the *Newfoundland* not more than 9 or 10 miles from the place where the *Newfoundland* was sighted by the *Mayflower* (p. 57); whereas at her rate of speed (8 knots) the *Newfoundland's* run should have been, in the three hours, 24 miles (p. 52); or, taking 6 o'clock as the time of the *Tecumseh's* boarding, in the two hours and a half, 20 miles (p. 57). She was near enough shore when sighted and when boarded to have seen the Morro lights and signals (p. 52).

It seems that while the Crooked Island passage is not the nearest route from Halifax to Kingston, it is the best, because the best lighted; but the distance from Sagua la Grande to Kingston around the west end of Cuba rather than returning on the course and going by way of Cape Maysi is 240 miles farther than by the latter route (pp. 54, 55).

The foregoing account is chiefly from Captain Mackenzie's testimony. The other officers of the *Mayflower* examined, Lieutenant Culver, navigating officer (p. 66), and Ensign Pratt, watch officer (p. 72), make this testimony cumulative and confirm it by various additions. As to the lights, Lieutenant Culver says that the light by which the *Newfoundland* was first sighted was very dim; that about twenty minutes of 10 the hull was sighted, but at that time no lights had shown at all except the dim one; that in heaving to, and as the *Mayflower* ran up on the *Newfoundland's* beam, all her regular running lights showed suddenly (p. 67); and Ensign Pratt, who was the prize master (p. 73), says the only light which showed was not a regular running light, and from the latter's testimony (p. 74) apparently the light which originally showed was a lantern hanging in the companion way of the after-deck house, which to be seen from another vessel would require the latter to come pretty nearly abeam, and if the lantern were seen, the regulation running lights on the masthead and sides would also be seen if lighted.

As to the distance of the *Newfoundland* from the Morro when captured, Captain McKenzie thinks (p. 64) that she

was a little farther off than 17½ miles, and not so far as 21 miles; and that, as to her distance from Havana light at 8.30 p. m., if 17½ miles is correct, her course from 8.30 (when, on the contrary, Havana light was, according to the log, 10 miles due south) would have been about due west—if 17½ and not 21 miles was the correct distance from the Morro at the point of capture; and the course would have been NW. by N. if 10 miles from Havana at 8.30 and 21 at capture are right (p. 66). Lieutenant Culver, upon returning to the *Mayflower* after boarding, took the bearings of Morro, found Morro to lie SE. by E., and estimated the distance to be between 17 and 19 miles (p. 68). Both the captain (p. 56) and Ensign Pratt (pp. 75, 131) testified that on the *Mayflower's* station there was not much current, or practically no current, and that the currents (so far as there were any) were variable. Ensign Pratt had fixed the position of the *Mayflower* at 8.30 p. m. by taking bow and beam bearings on the Morro, which were true within a quarter to half a mile, and showed that no time allowance for drift was necessary, because he was in the act of taking the bearings when the *Newfoundland's* light was sighted (p. 75). On pages 75–7 Ensign Pratt testifies to the successive changes of course run by the *Mayflower* in picking up the light of the *Newfoundland*. See also *Mayflower* log (p. 133).

The claimants' chart before the court, upon which these various positions, bearings, and courses were plotted, was supplied with data made by Lieutenant Culver on the forenoon of July 20, on bearings taken by himself locating the *Newfoundland* at the time her light was sighted

and at the time she was overhauled, with an approximation of the courses of the intermediate chase, on which is indicated in dotted lines the position of the *Tecumseh* given by her commanding officer (pp. 70–1, 134–5). A reproduction of this chart, as above stated, is inserted at the beginning of this brief, as well as of Lieutenant Culver's diagram.

Lieutenant Evans, commanding the *Tecumseh*, and Executive Officer Nickerson, of that vessel, testify (pp. 78, 83) that the *Tecumseh* was steaming on the Havana station, Morro light bearing from SW. by S. to SW. by W., and at the time the *Newfoundland* was sighted was about 6 to 8 miles to the north and east of Havana and about 3½ miles from the nearest shore, with the Morro light bearing at that time about SW. The *Newfoundland* was sighted by the *Tecumseh* proceeding under sail about 5 p. m., July 19, and the *Tecumseh* took her to be a schooner. At this time the latter's position relative to the Morro and to the *Tecumseh* was northward and east, and after a run of about half an hour, say 4 miles or a little over, in chase, the *Tecumseh's* speed capacity being 9 to 10 knots, the executive officer went on board the *Newfoundland* to examine and report. The *Newfoundland's* distance from the *Tecumseh* when sighted was about 9 miles away, north and east, and her course was west or a little south of west. The executive officer boarded at 5.35 p. m. exactly, found the *Newfoundland's* papers noted by the *Hudson* and *Badger*, and thereupon he indorsed the papers also and warned the captain if he wished to avoid trouble to keep to the north of west, and then returned to the *Tecumseh* at 5.50. Lieutenant Evans estimated the *Newfoundland's*

location when boarded apparently from bearings taken previously, and, allowing for the current set, by latitude and longitude, and both officers found this position to be unquestionably within the large dotted circle on the tracing (see frontispiece), and while not assuming to fix the position closer than within 3 miles, they say it was about the center of the circle. After the warning to the *Newfoundland* to go north of west, she proceeded in that direction, apparently standing on one or two points to the north of west. An extract from the log of the *Tecumseh* from 4 to 8 o'clock on the day in question is given on page 81 of the record.

The claimants' testimony was, that off Nuevitas the vessel was stopped by the *Badger*, and the register indorsed to the effect that her papers were regular, and the information given that the entire Cuban coast was blockaded (pp. 86–7, 127). They then passed Caibarien and Sagua, steering about due west without attempting to enter, and, still proceeding west, were stopped on the morning of the 19th by the *Hudson*, whose mate examined the papers, but made no memorandum, and then were spoken and brought to by the *Tecumseh* at 6.10 p. m. on the same day. The average rate of speed during the entire passage through Crooked Island passage and the Bahama Channel was 7 to 8 knots, following the channel and the line of the Cuban coast, and generally on a westerly course, without material divergence. At the meeting with the *Tecumseh* they were 14 miles offshore, and then steered one point north of west until 8 p. m. for about an hour and a half, when they returned to west, being then north of eastward of Havana light (pp. 89–93, 115, 124).

They proceeded then on the westerly course, and just before Havana light dipped at 10 p. m., distant 21 miles the bearing was observed to be N. NW. ½ W., a few minutes before the *Mayflower* dropped her searchlight and fired her gun. Up to that time the *Mayflower* had not been observed from the *Newfoundland* at all (pp. 93–4, 107, 122). The witnesses all testified that the regular lights were burning as usual (pp. 87, 98, 105, 115–6, 122–4), except the chief engineer, who was not in the habit of noticing the lights (p. 129).

The captain testified that Canadian customs authorities ordinarily grant separate clearances as well as manifests for more than one port, but this appears to refer to domestic clearances of subsidized mail boats from Halifax to other Dominion ports, and he says, doubtless inadvertently, that "they used to have a separate clearance *from* every port they were going to" (92, 93, 102). He also testified that the Havana light is a 21-mile light from the usual elevations, according to the Norrie and Wilson Sailing Directions and Chart, standard authorities throughout England and Canada (p. 94). He explained his failure to turn back for Cape Maysi when warned by the *Badger* off Nuevitas by saying that he felt it would be suspicious to turn around, and he wanted to satisfy the owners and charterers by passing Caibarien and Sagua la Grande. For the same reason—that is, to avoid suspicion—he did not show the charter party to the *Badger's* officer and the other boarding officers, and concealed the fact that his cargo was destined for Cuba (pp. 103, 104, 106). This explanation did not seem to satisfy the prize court (colloquy on pp. 110–11).

As to the position of the *Newfoundland* when boarded by the *Tecumseh* at 5.30 p. m. and when overhauled by the *Mayflower*, and as to her courses and distances, the master says they were 14 miles off the nearest shore when the *Tecumseh* boarded (p. 91); the chief mate says 13 or 14 miles, and that they could not see Havana light-house; and the helmsman says, "a long way off land" (pp. 115, 117, 124). All the claimant's witnesses who testify on the point, say they were boarded by the *Tecumseh* at 6.10 p. m., and proceeded at 6.30, changing the course then from west to west by north, and continued on that course until 8 o'clock, when they came back to west, thence continuing on the latter course until captured (pp. 89, 91, 92, 115, 116, 118, 122, 124). The log kept by the chief mate (pp. 64, 114, 118) shows at 8.30 p. m. that they passed Havana entrance, bearing south 10 miles; but he testifies that he first saw the light shortly before eight, a point before the beam south by west (p. 119); that he only guessed the distance when passing, and he nevertheless made the light to be 15 or 16 miles distant at that time, which distance he revised to 16 or 17 miles (p. 118), his log statement being based on "a rough calculation" in which he "gave the ship the benefit of the doubt" (p. 114); and by this he seems to mean that while he knew the ship was farther away than 10 miles, and he did not therefore put down in the log the best knowledge of the ship's position which he then had, nevertheless, not having correct bearings, he merely noted the position roughly and gave the ship the benefit of the doubt, as an error on the side of safety, by putting her nearer shore than she really was (pp. 114, 118, 121).

The position on the captain's chart similarly varies, placing the ship 17½ miles off Havana when they passed the light (p. 92). He is not sure, however, that all the positions were noted on the chart before capture (p. 107). Proceeding due west after 8 o'clock until 10 (pp. 92, 98, 116, 122, 124), about five minutes before capture the captain noticed the *Newfoundland's* position on his chart (pp. 107, 109). When he went on the bridge after the *Mayflower* fired her gun he had to stand on the bridge seat to see Havana light (p. 107); and the chief mate did not see it until he reached the compass pole, 15 feet above the bridge. It was bearing then SE. by S. ½ S. (p. 119) and 21 miles distant; but this is estimated because from the course steered this should have been the position of the ship; he knew he "was no nearer the light than 21 miles," because he took the bearings from the bridge just as the light was dipping, and because of the statements in the Norrie & Wilson publications (pp. 93–95). From 6 o'clock to the capture at 10 they had logged about 7¾ miles an hour and traveled 27½ miles (p. 98). Three hours later—that is, about 1 o'clock a. m. on the 20th—they set out for Charleston (pp. 109, 114, 132). Mr. Pratt and the captain agreed to split the difference as to distance, and fixed it at 18 miles (pp. 108, 132). Lieutenant Pratt, recalled (p. 131), says the captain placed the distance from Morro at 19 miles [not 21] and he himself at 17, and so the agreement was made at 18 in order to find a fixed point in laying the course to Charleston. The point of departure has been rubbed out from the chart, but is now indicated by pencil dot, and Mr. Pratt says that nothing occurred showing an

error in his original point of departure. Mr. Pratt thinks the light bore S.SE., but is willing to grant that it may have been S.SE. ½ E. (p. 132). He says that the drift, if anything, between capture and setting out for Charleston was farther out to sea, and that the Havana light was visible from the deck. The captain, being recalled, thinks the current was a little the other way (p. 133.) The captain also says here that he is not positive as to the distance of the agreed on position from Morro, but is as to the bearing. As to the visibility of the light, see testimony of Captain Mackenzie (p. 58), Lieutenant Culver (p. 68), Captain Malcolm (pp. 94, 107), Salkus (pp. 115, 117, 119), Lieutenant Pratt (p. 131), and *post* as to standard authorities.

The engineer of the *Newfoundland* testified as to a stoppage for daylight at the entrance of the Bahama Channel in the early morning of July 18; that they were steaming easy to save coal, and he showed an entry in his log on July 19, viz: "Owing to blockade we continued course to westward to Jamaica for coal," which was made on a statement of Captain Malcolm some time on that day (pp. 127–8). Nevertheless, they reached Charleston under full speed with about 80 tons of coal in the bunkers, and burned on the way from 15 to 16 tons per day, as against 17 in the early part of the voyage, and 12 in the days just before the capture (p. 129). An entry in the engineer's log at 4 p. m. on July 18, as they were passing the entrance to Caibarien, shows that they were "running slow," and from 5.15 to 9.25 at increased speed. This was, the captain says, to ease him

in his position by seeing the Key Francis light lit (p. 130).

After hearing, upon the additional proof, the court, by opinion filed September 12, 1898 (pp. 135–145), condemned both ship and cargo, and the claimants thereupon took this appeal, filing assignments of error, as shown at pages 153–155.

ARGUMENT.

We will consider first the exceptions and other preliminary objections of the appellants raised by the assignments of error, and then the question on the merits.

I.

PRELIMINARY OBJECTIONS.

The introductory question raised by the answers to the amended libel, the exceptions, and the assignments of error is that the bare allegation of the amended libel as to the seizure and that the vessel and cargo are lawful prize, striking out the words "in attempting to violate the blockade," etc., in the original libel (1, 8, 15, 16), is vague and uncertain and can not be met, and is wholly insufficient in law as stating a mere legal conclusion (18, 20, 153–4). But it is obvious that the amendment to the libel was made because the facts do not show the usual positive and direct attempt to violate the blockade, and the seizure in the act, so to speak, as is often or customarily the case, but the form of attempt at breach known as "loitering"—the course of preparations for breach which shows an intention to violate the blockade,

and the mere waiting about until an opportunity is found to do so with safety.

The Government then went on and showed by clear and preponderating evidence that the circumstances constituted a case of "loitering" with intent to violate the blockade. The opinion of the court shows that the proof on this point was complete and convincing, so much so, in fact, that the court was compelled to assent to it, perhaps reluctantly.

We therefore contend that the circumstances made the amendment of the libel necessary, and that the proof thereof exactly corresponded to the language and justified it, and that the objections of the answers, the exceptions, and the assignments of error on this point consequently fall.

Overt acts of an attempted breach, except so far as they reside in the course of acts and procedure which constitute loitering, did not necessarily exist and could not be properly alleged; and if they did exist, they would be developed and could be shown upon taking the evidence, and the amended language is therefore entirely accurate and proper.

The court below, in its opinion of August 17, cites authorities for the proposition that the accepted form of libel in prize causes states the prize capture in general terms, and the amendment to the libel intimated by the court's opinion to be necessary was properly allowable and allowed.

Upon this point we quote from Justice Story (Notes on the Principles and Practice of Prize Courts, p. 49):

> In prize causes it is not usual to file any special allegation of the peculiar circumstances on which

> the captors found their title to condemnation. The libel is and always ought to be the mere general allegation of prize such as is used in undoubted cases of hostile property. The act of bringing the vessel in and proceeding against her alleges her generally to be a subject of prize rights; and the captors are not called upon to state at the commencement of the suit the particular grounds upon which they contend she is so. They have a right to institute the inquiry and take the chance of the benefit of any fact that may be produced in the course of that inquiry. (Citing *The Adeline*, 9 Cr., 244; *The Fortuna*, 1 Dods., 81.)

As to the objection that further proof should not have been allowed, this proceeding rests in the sound discretion of the prize court. "The court is in no case concluded by the original evidence, but may order further proof on a doubt arising from any source or quarter; and it will sometimes direct it where suspicion is produced by extrinsic evidence. * * * The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories. * * * But further proof is in no case a matter of right, and rests in the sound discretion of the court." (Pratt's edition Story's Principles and Practice, etc., p. 24, and auth. cit.)

In the case of the *Sir William Peel* (5 Wall., 534) the chief justice shows that further proof may be ordered by the court of its own accord.

And in fact, in this case, while we contend that further proof was properly allowed to the captors, it might very forcibly be contended that the same indulgence

should not have been granted to the claimants, because they were thereby given an opportunity, after the pressure of the cause was known, to qualify, explain, and vary the testimony shown *in preparatorio* and upon the ship's papers, which is contrary to a well-established rule of evidence in prize law.

II.

THE MERITS.

1. *As to the facts.*

The Government submits at the outset the general circumstances and atmosphere of suspicion about this vessel. She was a sealer, not engaged in the West India trade before the Spanish war. She had been stopped and turned back at Guantanamo in June, where she showed a disposition to proceed in disregard of warnings (Rec., pp. 27, 31), and she was then under the command of the claimant and managing owner here, as to whose identity Captain Malcolm is rather secretive and vague (pp. 31, 83), as he also is about the letter of instructions from the charterers addressed to Captain Farquhar and shown to Captain Malcolm, but not left in his custody (pp. 30, 32, 85, 105) nor produced on claimants' behalf. A member of the crew not on the earlier trip had heard the common report at Halifax of the attempt to enter at Guantanamo (p. 48), but a member who was on that trip makes no mention of it in reply to the same interrogatory (p. 43), and the engineer, who was also serving then, is similarly reticent (p. 129).

The vessel proceeds from Halifax cleared for an alternative destination, an unusual clearance which seems to be customarily allowed under Canadian regulations when a vessel clears domestic as a subsidized mail boat, proceeding to other domestic ports; but this was a foreign clearance. Granting that the more westerly course through the Crooked Island passage was better and safer than the more direct course, even if the master was going around Cape Maysi to Jamaica, at Nuevitas he is distinctly warned of the blockade *de facto* of the north Cuban coast, which was then supposed to exist outside of the proclaimed limits, and knowing, or thinking at least, that he could not safely enter Caibarien or Sagua, and stating that he did not intend to enter, here he should have returned for the much shorter eastern run to Kingston. But, holding in reserve the alternative destination to Vera Cruz (the variation regarding which will be referred to later), he proceeds west, stops for forty minutes for daylight at the entrance to Bahama Channel, although it seems to be well lighted on both sides, and runs slow for an hour and a quarter as he is passing the entrance to Caibarien. This was about 4 o'clock p. m. on July 18. There appears to be nothing in the facts or evidence as to the vessel's conduct on passing Sagua, for the next knowledge of her is when she was boarded by the *Hudson* about 11.30 a. m., July 19.

The commercial motive of the voyage is of course obvious, and while, notwithstanding, humanitarians may not see a very heinous offense in the proposal to land food in Cuba, prize law can not admit that reasoning; especially not in relation to blockade, which, however

war may be otherwise softened, is meaningless unless strict and rigorous. Therefore, if the vessel is subject to condemnation, the cargo is hopelessly tainted. The voyage was made for the cargo; the ship is neutral as well as the cargo, and the case does not at all resemble an innocent neutral cargo on an enemy's ship. The offense must be kept in mind, and that is the attempt to violate the blockade, not, it appears, by open sailing for an interdicted port, but by motive, purpose, intent, preparation, and the attempt to enter, shown *per se* by the "loitering." This sort of proceeding is the gist of blockade running, which, whatever the immediate facts at capture, essentially consists of covert elusion and of waiting for opportunity. So much for the initial considerations.

Here it is well to refer to a statement of the court below, that, as Caibarien and Sagua were not included in the proclaimed blockade, the *Newfoundland* might safely and openly have proceeded to either of those ports with a frank avowal of the real destination and an exhibition of the charter party. The master did not seem to think so, however.

Now, there was considerable uncertainty, until the United States was well launched in the Spanish war, on the question whether the north Cuban coast blockade did or did not extend as a blockade *de facto* beyond the limits of the blockade of Havana and the ports and coast between Cardenas and Bahia Honda proclaimed on April 22, 1898. A memorandum of the Navy Department, dated March 23, 1898, contemplates the possibility of a more extensive blockade than the western half of the

island, and says that off much of the coast and off the smaller harbors a single vessel cruising to and fro may be all that is needed, and then suggests that off important ports, and notably off Havana, there should be three lines of blockade. (Appendix to Report of Chief of Bureau of Navigation, pp. 164, 171.) The commodore commanding the north Cuban blockade evidently thought even as late as July 17 that the blockade as established in fact, with that proclaimed, included the entire north coast (id., 256, 260), and until advised to the contrary by the Navy Department on August 8 and 9, that he had been authorized to blockade the north coast of Cuba, and that he had established and maintained an efficient blockade there especially in reference to Sagua la Grande. (Id., 296, 298.)

There was therefore at the time this vessel was seized near Havana, and when she was passing along the Cuban coast and ports farther to the east, abundant justification for the view of the various commanders to the east of Havana that the service they were performing was blockading service as well as scout and cruising service.

The master, at all events, thought, as the officers of the *Badger* thought, that there was a blockade at Sagua and Caibarien, and therefore it is not quite true that the master might well have gone to either of these ports for the purpose of testing the validity of the supposed blockade, which the court below appears to think (p. 143); at least, by so going he would have shown quite fatally his conjoint intention to break the blockade at Havana by endeavoring to break or test the validity of the blockade

which he supposed to exist at Sagua and Caibarien. In cases where vessels entering or issuing from ports not proclaimed but supposed to be blockaded, Sagua la Grande among them, were released, entire ignorance of the supposed blockade was shown. The argument on this suggestion in court, therefore, as bearing upon the master's intention embracing all three ports, one of which was and the other two of which he thought were blockaded, may proceed as if the conception of the naval commanders in that vicinity at the time was correct and Sagua and Caibarien were in fact blockaded. There was due notification to the master, in fact, and the only purpose of a proclamation is to notify. (*The Neptunus*, 1 Rob., 170.) Nor may a master just warned, within a short run of the points in question (to be measured by hours), assume discontinuance and allege proceeding to find out. This amounts to an intention to test the effectiveness, and may not be permitted. He has been warned and proceeds at his peril. "The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river and say, 'If you do not meet with the blockading force, enter; if you do, ask a warning and proceed elsewhere.'" (*The Spes and Irene*, 5 Rob., 76, 80.)

Those in charge of the *Newfoundland* thought before they proceeded from Nuevitas that the ports (Caibarien and Sagua) were blockaded, and they also knew that they had no reason to suppose the blockade would be raised before their arrival. (*The Admiral*, 3 Wall., 603, 616.)

Now, we contend by the foregoing that in reference to Captain Malcolm's belief that Sagua and Caibarien were

blockaded, and that he could not enter, his delays in passing along that part of the coast, as well as the specific loitering before Havana, for which particularly the vessel was condemned, show his general intention to break through the blockading line wherever he could and land his cargo.

The underlying inquiry as to how far a belligerent's blockade lines may interfere with a legitimate commercial voyage is now involved, and, assuming for argument's sake that the master was proceeding past, and not to, Caibarien and Sagua (though not for any conceivable reason, if he was going to Jamaica), let us consider the testimony as to destination.

The court below shows forcibly from the alternative clearance, the curious condition of the blanks for destination on the engineer's log, and from the testimony, how doubtful and vague that question was (Rec., pp. 143–4). In fact, the testimony is permeated with ignorance, disingenuousness, and ambiguous understandings on the subject. Beside the instances cited by the court and passages in the depositions *in preparatorio* (pp. 24, 28, 34, 36, 37, 42, 48) there are the following examples: The captain says "Kingston" (pp. 24, 28); he told Mr. Pratt "Vera Cruz" (p. 75); he says he didn't have coal enough to go to Kingston and Vera Cruz, and that as things turned out he was going to Kingston (p. 104); the engineer, on July 19, entered Kingston as the destination on his log on a statement from the captain; his previous log headings had been Vera Cruz and Kingston. The chief mate's attitude on the question is exactly the reverse of this—he changed his log heading, previously

"Kingston and Vera Cruz," to "Vera Cruz and Kingston" on the morning of the capture. He says that Vera Cruz was their destination; that they were bound first to Vera Cruz as the first port of call to his knowledge. This he emphasizes, saying he must have made a mistake when he put it down Kingston and Vera Cruz (pp. 119–20).

It is fair to admit that a double clearance, although unusual under our own navigation laws, would not necessarily be suspicious; but the double clearance here becomes suspicious, in connection with the other circumstances, because neither port was the primary destination, and the voyage on all the facts hardly looks legitimate in regarding the rights of *bona fide* neutrals relative to a blockade. Furthermore, the conclusion is irresistible that the captain's final determination (after he knew that he was thwarted) to go to Kingston rather than to Vera Cruz was based upon the fact that from the former port his chances for landing his cargo at some Cuban port were greater. Vera Cruz is the more distant point on the natural courses to the two ports all the way on his voyage up to a point about 35 miles east of Havana, for, according to the Hydrographic Office, the distance from Havana to Vera Cruz and to Kingston, by way of Cape Antonio, is 810 miles, and 740 miles, respectively.

We now come to the facts from the *Tecumseh's* boarding up to capture. The difference in time of about half an hour from the testimony of the *Tecumseh* and from the *Newfoundland*, respectively, may possibly be explained by the fact that the *Newfoundland* may still have been running on Halifax time or thereabouts, although this is not

likely, for nautical reasons; and because the *Newfoundland* and the *Mayflower* are substantially agreed as to the time of capture and subsequent events, and any difference then indicated is the other way; that is, makes the *Newfoundland's* time slower than the *Mayflower's* instead of faster, as it is said to be faster than the *Tecumseh's* about 6 o'clock. Now, it is most unlikely that vessels of the same blockading squadron, posted near each other would vary half an hour in the time on board. These circumstances, and the rule that the probability of a disputed fact must be taken against the side which has an interest or the greater interest, place the preponderance of the evidence in favor of the *Tecumseh's* story as to time. Similarly, the preponderance of evidence shows that the position of the *Tecumseh*, 6 or 7 miles about northeast of Morro, and $3\frac{1}{2}$ miles from the nearest shore when the *Newfoundland* was sighted 9 miles away to the north and east, with a run of $4\frac{1}{2}$ miles due north in chase, fixes the position of the *Newfoundland* when boarded by the former about 8 miles from the land, the Morro then bearing a little west of southwest, instead of 14 miles as the *Newfoundland's* master (p. 91) and chief mate (p. 117) testify, and unquestionably within and probably near the center of the chart circle, which is $10\frac{3}{4}$ miles from Morro bearing S. W. $\frac{1}{2}$ W. instead of at a point 24 miles from the Morro, $13\frac{1}{2}$ miles from the center of the circle and $10\frac{1}{2}$ miles from the point of the circle nearest the *Newfoundland* as fixed by the captain and the mate. As to the degree of daylight, Lieutenant Culver says that it was twilight on the evening in question at 7 o'clock, and at half-past seven it was pitch dark (p. 72).

This is confirmed by the chief mate, who says (p. 115) that sunset was 6.38, and that it was a clear night. He also says that they could not see Havana light-house (p. 117) either with or without glasses. Now, on the claimants' own statements of their position then and of the conditions and visibility of Morro light, they must have been able to see the castle or the light from the point of the *Tecumseh's* boarding, either as a daylight mark of 144 feet above the sea, or as a night light. Now, from this point the *Newfoundland* deflected from her westerly course by about one point north, and this is confirmation of the log statement that at 8.30, passing Havana entrance the light bore south 10 miles, if such confirmation is needed against the inconsistent statements of the master and mate that notwithstanding the log the light was farther away, about 17 miles. Here again the argument based on interest counts against the weight and credibility of the ship's testimony, and the log record telling against the party making it must be accepted as verity.

About this point and time the *Mayflower's* chase began, and when it ended, at 10 o'clock, at a point stated by the *Mayflower* witnesses to be 17 miles and by the *Newfoundland* witnesses to be 21 miles, and afterwards agreed upon by Mr. Pratt and Captain Malcolm to be 18 miles, about NW. by N. of the Morro, the captain said that they had gone in the three and one-half hours (according to his time) 27½ miles—that is, 8 miles an hour. The time was, however, four hours, and they should have gone 32 miles unless they lagged. The distance, as a matter of fact, from the boarding point of the *Tecumseh* to the point of cap-

ture is only 18 miles; and as to the performance of the *Newfoundland* from 8.30 until capture, the astonishment of Captain Mackenzie, when told her rate of speed and her due westerly course, is convincingly obvious from the colloquy reported by Captain Malcolm (pp. 99–100), because the *Mayflower* had been chasing at a rate of from 11 to 16 knots. Either the *Newfoundland's* rate was greater than stated, or her lights were out and she was zigzagging. As to the course, it is just possible, as stated by Captain Mackenzie, that the *Mayflower* alone, and not the *Newfoundland*, was repeatedly changing her course; but this does not appear very likely from the *Mayflower's* log (p. 133) and the account of Watch Officer Pratt (pp. 75–77), and from the latter's evident vigilance, and Captain Mackenzie's statement that it is possible, adds that it can not be reconciled with steering a west course (p. 62.) The *Mayflower* constantly lost the light, and the captain says if the *Newfoundland* were going west they must have seen it, but if west by north, that is just on the verge of losing the light (p. 66); and Ensign Pratt says that if the *Newfoundland* was heading west and the *Mayflower* running N. NW., as she did, shifting gradually around to NW., he would just be getting within range of her light, and that if she was heading west her masthead light should have been visible anywhere from W. to S. SE., and that she was bearing when picked up N. by W., the reciprocal bearing being S. by E., and that consequently he would then have seen the light, because being then one point on its visibility. If she was heading west when the slight light was picked up, her lights would have

been visible all the way from W. to S. SE., and she having come from the east, steering a west course, he could of course have seen the masthead light before (pp. 76, 78).

It is thus seen from the chart that the *Newfoundland* had only sailed 18 miles when she ought to have sailed 32 miles, and there are 14 miles, or, at her rate of speed, about two hours of time to account for. Even if the time of departure from the *Tecumseh* is fixed at 6.30 and the *Newfoundland's* rate of speed at a fraction under 8, her captain says she had gone on a W. by N. course up to 8 and on a west course thereafter $27\frac{1}{2}$ miles, and that would have taken her many miles west of the point where she was overhauled. It is therefore necessary to conclude that she loitered on the way, awaiting an opportunity to slip into Havana, and the conclusion of the court (who, it is to be remembered, heard the witnesses and observed their bearing) that the vessel approached near enough to Havana to render it easy to elude the blockade, and tarried there sufficiently long to learn whether she could do so with safety, is not only justified but compelled by the evidence, which shows, as the court found and as we think we have demonstrated, that her presence there was not consistent with innocent intent. She approached "in the night time so near to [the] blockaded port as to be able to see signals from the shore and to watch for the opportunity of entering if it should appear that the coast [was] clear or the vigilance of the belligerent cruisers * * * for the time relaxed. A ship so approaching lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade, and there is a necessary presumption of sinister

motive, which must be rebutted by positive proof that her presence there is innocent; that she is there either from some necessity or in the course of a voyage which requires her to pass that way" (opinion court below, Rec., p. 144). Now, the vessel did not bring positive proof rebutting this presumption; she failed to sustain by adequate proof the denial that she was there, and did not give a satisfactory account of her being in that neighborhood at all (pp. 144, 145).

As to the absence of lights on the *Newfoundland*, it is of course possible that the *Mayflower* would not see those lights until on their crossing the courses they ran far enough up on the *Newfoundland's* beam to get within the range of visibility, and therefore the *Newfoundland's* lights might have been duly burning all the time and not only have suddenly appeared just before the boarding. But it is certainly strange that the faint light was constantly picked up, being apparently in a position (hanging inside the after-deck-house door) where the range of visibility was at least not greater than that of the regulation masthead and side lights. As to the visibility of the Havana light, by the chart it is laid down at 18 miles (p. 68), 15 feet above the water level, so that it would have been dipping, as the captain says, from the *Newfoundland's* bridge at that distance, which is about the distance claimed by the officers of the *Mayflower*. Lieutenant Culver testifies (id.) that it would be visible from the eye 25 feet above the sea 21 miles—that is, from the bridge of the *Mayflower;* but he says that the *Mayflower* was rather high out of the water, and that he thinks the bridge of the *Newfoundland* is probably lower than the

bridge of the *Mayflower*. He did not go on the *Newfoundland's* bridge; in fact, he does not know that she had a bridge, although probably some sort of a place over the deck house. He did not go on it (id.). Captain McKenzie says (p. 58) that the light is an 18-mile light, and claimant's counsel admits that this is the visibility at 15 feet elevation from the sea. Now, this elevation appears to be approximately the elevation of the *Newfoundland's* bridge, being lower than that of the *Mayflower*.

Relative to the facts on this subject as they may be found in the Sailing Directions and Charts of Norrie & Wilson, these and like publications of other private firms, although they may contain much information useful to mariners, are not considered governmental standards of authority. The range of visibility of the Havana-Morro Castle light is given by the Hydrographic Office Light List, Part 1, 1899, the British Admiralty Light List, Part 8, 1899, and the last edition of the Spanish Light List, 1893, as 18 miles from the height of the eye of the observer 15 feet above the water. All of the above-mentioned publications are standard authorities. This is positive confirmation of the Government statement as to the distance of the point of seizure from Morro, viz, 17½ or 18 miles.

The claimants, asserting this seizure to have been a gross marine trespass, rely greatly upon Captain Mackenzie's sending the vessel in merely on suspicions derived from our consular authorities at Halifax, and the captain's own statements to this effect; but he says (p. 56) that he would not have sent the ship in if she had not been spoken by the *Tecumseh* and had shown her running

lights. His duty demanded that he should board her, and having boarded and found the previous warnings, he would have been derelict under the circumstances if he had not sent her in; and Lieutenant Culver says (p. 67) that the cargo invoices, the log statements of the *Tecumseh's* boarding, the omission of course or speed from the log after 5 p. m. on that day, the separate clearances, the captain's vagueness in his replies as to his destination, saying, finally, that he had not made up his mind yet whether to shape his course by way of Cape San Antonio, were the suspicions presented to him. Of course they were positive and ample and justified the prize voyage.

Finally, as to the facts, it must be remembered, in Captain Mackenzie's language (p. 63), that "you don't always catch the person right in the act on a dark night. If he is actually running the blockade, and can put up a good gait, nothing will stop him unless he is afraid of a little gunpowder."

2. *The authorities.*

The court below, while compelled to condemn on the preponderance of evidence as to loitering, notwithstanding certain meritorious or ethical considerations which the court found in the case, thinks that the facts fall short of those in certain famous judgments of Sir William Scott on loitering, as to which it is stated that the vessels were actually heading for the forbidden ports, a circumstance which appears to be absent in this case; but it must be observed that in the dark chase previous to capture, if the navy story showing that the *Newfoundland* was not holding a straight westerly course be true,

as we contend it is, she may well have been heading for the forbidden port in numerous attempts to run in on her successive changes of course, until successively overreached by the unconscious *Mayflower* losing the light and running up on her beam, and thus compelled to head offshore again.

It is true that in the *Charlotte Christine* Case (6 Rob., 101) the vessel continued to approach the shore after she had been hailed by the captors, and had refused to bring to after the first notice; also in *The Apollo* Case (5 Rob., 286, 289–290), the vessel was headed toward Dieppe, but the underlying principles are not necessarily dependent on this circumstance, as is shown by the following quotations:

> * * * The master had stated * * * that he was actually sailing for Caen and had no intention of breaking the blockade of Havre.

The court then refers to the circumstance of the approach to shore:

> * * * Whatever the equivocal cause of such a situation may be, a person can not be allowed to approach so near to a blockaded port as to place himself almost within the effectual protection of the shore and with no necessity existing. To allow such an approach would render the whole purpose of blockade perfectly nugatory. (*The Charlotte Christine*, 6 Rob., 103.)
>
> It must be clear and obvious to [the master] that the *neighborhood of the blockaded port* can not be considered as the *fit locus deliberati* for his future plans. If the court was to admit that a master *might lie to* and call a council of his own thoughts or of those of his crew in such a place, the rights of blockade could no longer exist to any purpose. *He*

would stay in all cases until an opportunity offered of slipping into the interdicted port. It would be practically inconsistent with the exercise of this right of war to hold that the blockading force is bound to stay by him and wait for the result of his deliberation in this suspected place. On the contrary, his first duty is obvious, *fuge litus;* that neighborhood is at all events to be avoided. He is bound on the first notice to take himself out of an equivocal situation, and if he obstinately refuses, and neglects to do so, this court will hold, till it is corrected by the judgment of the superior court, that such a conduct will amount to a breach of the blockade and subject the vessel to condemnation. (*The Apollo,* 5 Rob., 289, 290.)

In the *Gute Ewartung* (6 Rob., 182) it was a Lubec ship coming from Oporto with an asserted destination to Caen, captured 20 miles to the northwest of that port and about the same distance from Havre. There it was true that the vessel was steering to Havre, and in this case the vessel was not steering to Havana at the exact moment of capture; but it is to be suggested that in the cited case the vessel must have overrun her port on the course from Oporto and have been coming back from the northwest; because a vessel running from Oporto to Havre and Caen would naturally come in from the southwest, or, at furthest, from the west. That is, the ship in that case was coming back on a long tack, apparently, from a point beyond the forbidden port, while here the vessel had not gotten past and was pursuing various, and, at the end, desperate, short deviations, either to get in or to get away. Under the different modern conditions, the *Newfoundland* could not take such

open risks as were taken in 1805, for with many blockading vessels and swift cruisers running at the rate of 14 to 18 knots a master needs to be more scrupulous and careful and can only risk short variations from the alleged course, and that with a vigilant watch. Greater chances were taken in the days of sailing vessels. The court says:

> In the present instance [comparing it with the *Charlotte Christine* Case] the vessel was at the distance of near 20 miles; but the unfavorable circumstance to which I allude places her in construction of law in the same situation which the other vessel had actually reached, for the master says that the course which he was steering would have carried him directly to Havre, and that he should have continued in that course, though not into the port of Havre; but that he should have gone close under the land and have taken a pilot for Caen. Here, then, we perceive the same intention and in the course of being pursued to the same illegal effect. How can this intention be considered as innocent? It had not been carried so far as in the other case, I acknowledge, but only because the vessel was interrupted before she had arrived at the spot where the other ship was actually taken. It is impossible that any blockade can be maintained if such a practice is allowed. * * * I am of opinion that the master in this case had declared an unlawful purpose, and *was employed in pursuing it to an unlawful act;* and that the ship and cargo must be pronounced subject to condemnation. (6 Rob., 183, 184.)

Now, this vessel was drawing a circle around Havana through or on the edge of the blockade. Because in her loitering she was finally seized on the western edge of

that circle, and not by the *Tecumseh*, before its middle point opposite Havana entrance was reached, when her true character and purpose were unknown, is she, in view of the obvious intention and of all her acts, to be relieved of the penalty? Punishment properly follows upon the principles announced by Sir William Scott quite as justly as if her experiments had proved fatal on the eastward rim of the circle.

In the *Neutralitet* (6 Rob., 30, 35) the court agrees to the position advanced by the captors, that a belligerent need not admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please.

> If a vessel could, under the pretense of going farther, approach *eg pres* close up to the blockaded port so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption *de jure* that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war. (Id.)

The only difference in this case is that here the vessel has performed all of the acts which show the intention and constitute the breach, and not deeming the opportunity favorable, because of the strictness of the blockade and the numerous vessels, has reached a point in the circle of attempt where she may with plausible reason

allege that she was moving away and on her regular commercial course. The latter is shown to have been very vaguely and ambiguously regarded.

The *Mercurius Case* (1 Rob., 80, 82, 84) is a very strong authority in favor of the Government's contention here, because, while the master of the vessel, pretending to be proceeding to Hamburg till he came to the passage into the Zuyder Zee, which he then attempted to enter, either did allege or might have alleged that he was seeking a port in the Zuyder Zee to which the blockade did not extend, the court nevertheless says:

> How far the blockade might extend to all ports in the Zuyder Zee I shall not now inquire, *because I am sufficiently convinced that the intention of this master was to proceed to Amsterdam in defiance of the prohibition, which he distinctly understood.*

So here, whatever the master's right as to Caibarien and Sogua, or whatever the truth concerning his intention as to Kingston and Vera Cruz, his intention to run into Havana in defiance of the prohibition is sufficiently clear.

There is, it is true, in this case a denial of the intent, but the intent sufficiently appears from the evidence, and the case undoubtedly falls under the ban of the judgment in the *Circassian Case* (2 Wall., 151, 152), where the Chief Justice announced for the court "that sailing from a neutral port with intent to enter a blockaded port and with knowledge of the existence of the blockade subjects the vessel, and in most cases its cargo, to capture and condemnation." The court finds this rule sound, and, established with some hesitation when sailing vessels

were the vehicles of ocean commerce, now, when steam and electricity have made nations neighbors and blockade running from neutral ports seems to have been organized as a business and almost raised to a profession, an indispensable rule for the efficient exercise of belligerent rights.

In the case of *The Mentor* (Edw., 207), the exact circumstances in which the vessel was found do not clearly appear, but it does appear that she ostensibly sailed for a permitted port, and that she was found in a suspicious position, or one inconsistent with the alleged destination, and she was condemned. This case is the same, the conflict among the claimants' own witnesses about the destination, the relation of either destination to her previous voyage, and the relation of her final alleged destination to her position when captured, all show that her situation was highly suspicious and her claim of commercial voyage inconsistent therewith.

The underlying theory, apparently, of Sir William Scott's judgments is that blockade lines effectively maintained are a belligerent right which must be scrupulously regarded by commercial adventurers and must be rigidly enforced by prize tribunals; that the right of blockade is an impregnable right and admits of no relaxation; and it may be added that while modern ideas of war are proceeding through a transition to large mitigations of its rigors, no development on this side can affect the blockade side of war, if war is to continue at all. A commercial voyage, in other words, however the rights of neutrals are safeguarded generally, must yield reasonably and

clearly to blockade lines. The only safe rule is Sir William Scott's rule, "shun that neighborhood," and shun it so definitely that there can be no mistake.

In the prize case heard by the court at the last term, that of the *Olinde Rodriguez* (174 U. S., 510), the Government contended for this rule, asserting that inasmuch as the vessel was on a route from Puerto Plata, Santo Domingo, to St. Thomas, Danish West Indies, from which San Juan, Porto Rico, had necessarily been dropped as a port of call, she should have been well off the Porto Rican shore, and that her presence at least 7 miles nearer shore than the safe limit invoked this rule as conclusive cause of condemnation. But in that case the court found such conflict in the evidence as to location and as to the acts indicating intent and attempt to violate the blockade that they held the circumstances, although suspicious, did not require them to condemn the vessel of a friendly nation (p. 535).

The Government here again invokes the same principle, but in relation to new facts, namely, the facts which constitute the dilatory conduct, the lagging and loitering before capture, which require, as we contend, the condemnation of this vessel and the cargo.

We therefore submit, in conclusion, that this condemnation is to be sustained on the facts shown, on the conduct of the vessel and the demeanor of her officers, and on the claimants' own testimony; and that the vessel and cargo are not to be released because of the mere accident that in the vessel's erratic course and in her dilatoriness preparatory to running in under the Morro guns she had

been carried somewhat to the northwest of Havana on the circles she was describing thereabouts.

We respectfully submit that the judgment of condemnation in the prize court should be affirmed as to both vessel and cargo, with costs.

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No. 156.

Supp. Brf. of Atty. Gen. for Appellees.

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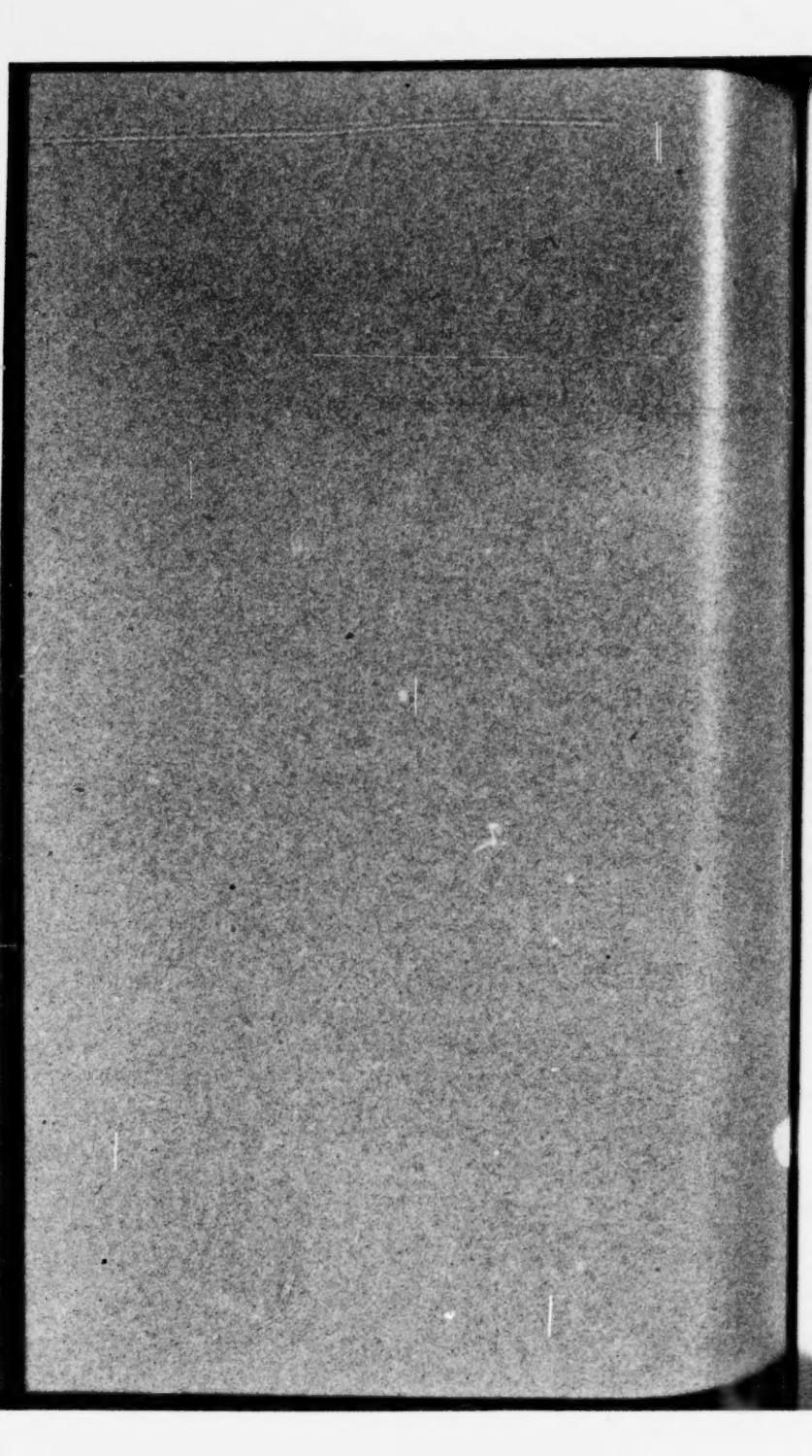
In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JAMES A. FARQUHAR, OWNER AND claimant of the steamship *Newfoundland*, and David Robertson & Co., owners of the cargo of said steamship, appellants,
v.
THE UNITED STATES.
No. 156.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE CAPTORS.



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1. *Further proof.*

Replying to the claimants' brief, it is to be observed that they especially challenge (brief, pp. 11–21) the action of the court below in allowing further proof. The court, however, allowed the claimants as well as the

captors further proof, and the claimants proceeded to take further poof, recalling their witnesses *in preparatorio*. As we point out in the main Government brief, the allowance to the claimants might well have been regarded as improper, because they were thereby permitted to explain and vary their evidence at the first hearing. It is beyond question that the prize court has the discretionary power to order further proof; this the claimant concedes in his brief (p. 14). It is well settled that the court may make the order upon a doubt arising from any source or quarter and upon its own accord. The discretion so exercised here was soundly and legally exercised. The casual reference in the opinion of the court to Commander Mackenzie's merits as an officer and a man had nothing to do with the order. Captain Mackenzie's suspicions were well-founded. They were shown by his action in seizing the vessel, and by the testimony *in preparatorio*—for instance, by the answer of Captain Malcolm to the third interrogatory, in which the information from Halifax that the *Newfoundland* had left that port with the intention of running the Cuban blockade, was obviously only one of several reasons for Captain Mackenzie's suspicions and was specifically joined with the absence of lights and of the alterations of the *Newfoundland's* course. Furthermore, Captain Mackenzie's indorsement on the *Newfoundland's* log, found in the opinion below (Rec., p. 12), while it would not have been sufficient to condemn, and for that purpose would not have been considered on the first hearing, was a source of doubt from which the court might properly draw, confirming, as it did, the master's testimony on that subject. Hence the court, in

saying "it furnishes ground for further proof" (p. 15), was referring not to Captain Mackenzie's character, but to his suspicions and their obvious gravity.

The claimant thinks that the opportunity to explain is usually given only to claimants; but that there is at least a balance between the rights of the two parties in this regard is shown by the quotation from the opinion of the Chief Justice in the *Sir William Peel*, 5 Wall., 534 (brief, p. 14): "If upon this evidence the case is not sufficiently clear to warrant *condemnation* or *restitution*, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof." And Justice Story says, summing up the question on both aspects (Notes on Principles and Practice of Prize Courts, pp. 25, 26), that the privilege may be forfeited by both parties because of fraud or gross misconduct; and that further proof is necessary in all cases "where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence in general induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions." * * *

We respectfully submit that in view of the reasonable suspicions and doubts which the facts about the vessel as subsequently developed fully justified, the case was "not sufficiently clear" to warrant restitution, but, on the contrary, required further proof, and if the privilege was properly granted to the claimants at all, it was to enable them to explain circumstances plainly "pregnant with suspicion." All of the cases cited by the appellant in

reference to prize as well as in reference to the general exercise of legal discretion sustain the Government's contention. The hesitation to allow further proof to captors arose where they were casting about for reasons for condemnation—where there was mere suspicion or no just suspicion. That is not this case, and the discretion of the court was exercised not in an arbitrary, vague, and fanciful manner, but legally and regularly. So, in particular, to refer to the judgment of Sir William Scott in *The Haabet* (6 Rob., 54), as cited by the appellants on pages 17 and 18 of their brief, the rule is to take the original evidence of the claimant as conclusive *if not impeached*, and the court there, evidently having before it captors' depositions upon their motion to give their version of the circumstances of capture—that is, the court, not having ordered, as is the fact in this case, further proof of its own accord upon its own doubt or suspicion—remarked that the depositions in that case were "as void of suspicion as any which the court is in the habit of perusing."

The Government therefore claims that the circumstances presented a case of "doubt," one of "strong suspicion," one "pregnant with suspicion," that the case was one "clouded with suspicions or inconsistencies." Upon the evidence *in preparatorio*, it is only necessary to refer to the double clearance, to the illogical reason for passing Sagua and Caibarien after he had been told [although erroneously] that those ports were blockaded (p. 29), and to the uncertainty and disagreement about the destination shown throughout all the testimony *in preparatorio*.

2. *The claim for damages.*

Ordinarily, costs in admiralty follow the decree. The subject of costs as well as a claim for damages is largely in the discretion and judgment of the appellate court. Even on a decree for restitution, the court has repeatedly held, under circumstances showing justifiable conduct on the part of the captors, not only that claimants' costs and expenses were not to be decreed against the captors, but that both costs and expenses were to be decreed against the claimants. (*The Dashing Wave*, 5 Wall., 170; *The Science*, Id., 178, and other cases on following pages; *The Mary*, 9 Cranch, 126; *The Venus*, 5 Wheat., 127; *The London Packet*, Id., 132; *The Springbok*, 5 Wall., 1; *Sir William Peel*, Id., 517; *The Olinde Rodrigues*, 174 U. S., 510.)

A fortiori a claim for damages could only be hopefully addressed to the court where there has been a gross outrage and a palpable marine trespass. Can it be seriously contended that in this case, in which the Government is earnestly pressing for condemnation of both vessel and cargo upon facts which plainly show a violation of the law and under circumstances which at the very threshold cast the gravest doubt and suspicion upon the claimants, a claim for damages may be advanced which the court could seriously entertain? We respectfully submit, in asserting the right of the Government to the penalty of condemnation, that the mere outline of the facts carries the case at once and far beyond the doubtful region of mere probable cause. Consequently the cases which state (brief, p. 23) that restitution must be restitution of

original value, with full damages and costs, have no application, and in *The Watchful* (6 Wall., 93), which is cited on the next page, it was very clear that there was no intention to break the blockade or to trade with the enemy.

3. *The objections to the charts; the verity of the respective stories.*

The court will perceive that the real conflict is as to the positions and movements of the *Newfoundland* from 5.30 p. m. of July 19 to the capture at or near 10 p. m. The contrast between the two stories is graphically shown by the charts in evidence. The claimants assert that the *Newfoundland* was from 7 to 10 miles farther offshore than the navy story shows her to have been; until at the point of capture the difference is 4 miles. The appellant complains (brief, pp. 25, 33) of the introduction of Lieutenant Culver's diagram and the superposition of the data therein shown on the claimants' chart. They state that this chart was properly in evidence, because the positions there shown were ascertained by the master by actual observation and according to scientific rules, while the captors' diagram was merely composed from hearsay information and approximate estimates.

Examining the facts, we find that the court admitted the diagram and requested the addition of its data to the claimants' chart in the face of the same objections urged here (record, pp. 70, 134). The captain says he noted the ship's position at the usual intervals during the voyage on the chart from a memorandum book which was still in his possession (p. 86). The chart was not placed

in the possession of the prize master, as it should have been if it was a ship's paper; and, if private, it really should not have been admitted at all into the case (United States attorney's objection, p. 90). The captain admits (p. 107) that he drew certain lines on the chart after the prize master went on board, and being asked on cross-examination (id.), "Were those points, all of them, on the chart at the time when he went on board?" he answered, "I am not sure about all of them; there are some points here not on the chart that I have put on since; they have reference to the position." He says (p. 92) that his chart position places the ship 17½ miles off Havana when they passed the light. The court's attention has been specially directed in the main Government brief to the variation from this statement in the mate's entry in the log, which showed Havana light bearing south 10 miles at that time (rec., p. 118), and the point is now reiterated to show the unreliability of the captain's chart. The mate endeavored, neither successfully nor consistently, to change the fact, and stated the distance to be variously 15, 16, or 17 miles (id.).

On the other hand, Lieutenant Culver states (p. 70) that the only part of his sketch which could be regarded as hearsay is the location of the *Tecumseh;* that he made the tracing based on bearings he took himself, located the ship at the time the *Newfoundland* light was sighted, and located her again at the time the *Newfoundland* was overhauled. He added the position which was given to them by the officer of the *Tecumseh.* This sketch was made on the forenoon of the next day (id.). Captain Mackenzie states (p. 52) that the work was done by Mr.

Culver from the log—from the run of the ship—he being the person charged with that work on the ship; and he adds: "The thing is very close, but the first position and the final position are quite accurate." Now, it will be remembered that the first position was that at 8.30, and that, as Captain Mackenzie said (id.), "Her position [the *Newfoundland's*] at 8.30 by the log and our position agreed almost exactly." Mr. Pratt says (showing the accuracy of the *Mayflower's* log entries, from which Lieutenant Culver obtained the facts for his tracing): "I had been told to take bow and beam bearings of the Morro" (p. 75). Such bearings would give accuracy within a quarter of a mile (id.). And it clearly appears that he was taking it when the *Newfoundland's* light was sighted. The bearings so taken, and thirty-five days' experience in blockade service, were the basis of his estimates.

Then, as to the location of the *Tecumseh*, asserted by the claimants to be either hearsay or mere guesswork—it was not hearsay, because on pages 79–82 both Lieutenant Evans and Mate Nickerson confirmed and verified the position by the tracing. The latitude and longitude of the *Tecumseh's* position was based upon cross-bearings taken at noon of that day, with allowance for drift. While Lieutenant Evans states that the position of the *Tecumseh* when the *Newfoundland* was sighted was an estimation (but made in the light of a previous observation), his customary station between the prescribed bearings of the Morro enabled him to verify the location by the distance of 6 or 7 miles north and east of the Morro, and about 3 from the nearest shore; so,

also, Mate Nickerson; and they allow liberally for discrepancy by not assuming to fix the position at boarding nearer than 3 miles. This is not loose guesswork. From the testimony it is plain that the *Newfoundland*, when boarded by the *Tecumseh*, was at the farthest 8 miles offshore, instead of 14, as the claimants say. It is upon this asserted distance at that point, which is disproved by their own testimony, that the entire fabric of their subsequent contentions and arguments rests; although, even if that distance were granted, there would be the same difficulty as to distance passed and time consumed in the interval between 5.30 and 10 o'clock to account for.

As to the time for the various events with reference to the *Tecumseh*, there is no uncertainty or inconsistency in the testimony of her officers. The mate is positive as to the time of boarding and of return to the *Tecumseh*, and Lieutenant Evans submits the log showing the times of sighting and boarding, and corrects the question on cross-examination by which the hour of departure of the *Newfoundland* was fixed at 6.30, by fixing it at 6 o'clock, or very near that hour.

Although the appellant's brief undertakes to do away with the effect of the mate's log entry and assumes to show that the position of the *Newfoundland* at 8.20 or 8.30 p. m. is not proved by the officers of the *Mayflower*, we submit again that the position is very exactly proved by the agreement between the *Mayflower* and the *Newfoundland's* log as to the bearing and distance of the Morro at that time, as well as by the *Mayflower* testimony.

As to the rate of speed of the *Newfoundland*, the captain says that the average rate was about 7½ knots (pp. 95, 97); that from the time of stoppage by the *Tecumseh* until 10 o'clock the rate of speed would figure out about 7¾ knots (p. 98). He told Captain Mackenzie 8 knots (p. 99). The engineer speaks only of engine revolutions, 65 being the greatest number of which the ship was capable when light, 60 the ordinary average number. They were running 58 revolutions at the time they were stopped by the *Mayflower* at 10 o'clock (pp. 125, 126). Whatever the relative speeds may have been at these revolutions, he says (p. 129) that, burning somewhat less coal than they had burned on the first days out from Halifax, they had made full speed from Havana to Charleston, with their load, on revolutions running 60, 63, and 65. It thus appears that the captain himself gave the basis for the theory that the rate of speed of the *Newfoundland* was 8 miles per hour, and that both he and the engineer were highly inconsistent on the subject.

The appellants' brief then goes on, viewing the charge against this vessel as a mere "theory" of the captors and the court below, to construct a hypothetical defense somewhat to the following effect (pp. 52–61):

They start with the assertion that the positions and courses of the *Newfoundland* previous to the meeting with the *Tecumseh* must be accepted as proved, the facts being laid down on the chart of the master and not disputed by any direct evidence, and the log of the *Newfoundland* having been in the possession of the United States attorney. They carefully refrain, however, from bringing forward their log to fortify any of their statements. They

then attempt, upon the testimony of the *Mayflower's* officers as to their actions immediately after the *Newfoundland* light was sighted, and the courses and rate of speed of the *Mayflower*, to work out the exact direction and distances of the successive runs and to check their calculation by working the result back, and find that there is a variation of 3 or 4 miles in the stated positions of the *Mayflower*, both at the beginning of the chase at 8.30, and at the conclusion at the point of capture, about 10 o'clock. This amounts to very little, because the *Mayflower's* officers do not profess to state the details of the intermediate run with exact and mathematical accuracy, and the claimants allow nothing for the successive slowing and starting and the consequent loss of time and distance as the *Mayflower* changed her course. Proceeding on the assumption of the correctness of Captain Malcolm's chart positions from 12 o'clock, noon, on, they state that to bring the vessel out where the *Tecumseh* says she was, they must have proceeded, not west, which the chart and the testimony show, but first west, then southwest, and then again west. But her previous positions are not so clearly and frankly proved as to be accepted as verity, and we are dealing with a variation in the stories from the point where something like exact knowledge begins, that is, at 5.35 p. m., when the *Newfoundland* was 5 to 8 miles off land instead of 14, as they say. If she had been 14, their detailed figuring out of their time and their distances might bear some examination. And again, if they had been 14, the apparent impossibility of the runs, courses, and distances, which they attribute to the Navy story, as shown on their chart, interleaved at page 58, might

stand scrutiny. But the entire structure of their argument falls when their distance from land at 5.35 is shown to be 7 to 8 miles and not 14.

Again, the engineer's log and testimony show that little reliance can be placed on what he says as to the speed of the engines, and the claimants' attempt is largely based on the verity of his statements; and in presenting the subject they continually refer to the "theory" of the captors, which the court, as they say, erroneously permitted to prevail over the "contrary proof of the master of the ship, of his chart, and of the ship's log and the engineer's log" (p. 60). We again submit that they bring no proof from their log to sustain their contentions, and that the log proof plainly adduced in the record undermines the foundation of the argument by showing that the vessel at one crucial point of time (that of passing Havana) was 10 miles, and not 17 miles, offshore.

Now, if the vessel had been 14 miles offshore at 5.35 p. m. (the claimants' chart in evidence, by the way, and their hypothetical draft based upon it at page 58 of their brief, give an entirely misleading comparison of the respective claims as to distances at any of the points and places, they being much farther offshore by this visual scale than they were even according to their own account), they would, standing one point north of west at 6.30 until 8 o'clock, have reached at 8.30 a point about 17 miles from Havana, and then, if they had kept due west, would have been about 21 miles generally northwest of Havana light at the time of capture. But so also, if they had been, as we claim they were, 7 to 8 miles offshore at 5.30 when boarded by the *Tecumseh*,

standing on a point north of west until 8, and then west, it would have brought them off Havana light at 8.30, at the distance which their own log says they were, viz, 10 miles; and then, if they had proceeded due west, as they claim, they would have come out at the point of capture, 17 miles northwest of Havana, as the Navy say. If a due-west course after 8.30 would have brought them out less than 17 miles, then we submit that the Navy account of the *Mayflower's* chase, showing obvious changes of course by the *Newfoundland*, indicates such deflections from the alleged course as would naturally bring her out somewhat farther away than an undeviating western course; and this is only one of the many points of inconsistency which raise the grave doubt and pregnant suspicion in the case.

Further, their own statement of the distance from land at the time of capture, 13 or 14 miles, is another indication that the distance of the Navy account from Havana is true rather than the claimants' statement of distance then. Now, if they were 17½ miles off Havana at 8.30, and kept due west, at 10.30, when they were captured, they would have been not 13 or 14 miles off land, but about 21, their distance from Havana, because the Cuban shore to the westward of Havana falls away to the south.

Still further, if they were 17½ miles offshore at 8.30, and kept due west and were 17½ miles from Havana when captured, which we say is the correct distance, not only because of the Navy testimony, but because of the patent facts relative to the visibility of the Havana light (and even because of their own testimony on this point),

then, notwithstanding their claims, they must have deflected to the south of west at some point between 8.30 and capture.

It does not at all weaken the Government's story, which is based upon the view which the facts themselves plainly suggest that the *Newfoundland* was not at all times on the evening of July 19 proceeding due west, except for the slight deflection north of west from 6 o'clock to 8, to grant that the Navy story shows that the *Mayflower* sailed generally northwest from the time the chase began until its conclusion. The *Newfoundland* may or may not have been sailing northwest all the intervening time; it is sure they were not sailing west all the time; they may have been and probably were sailing northwest as well as in various other directions for part of the time. Their general course was somewhere between west and northwest to bring them out, not about 13 to 14 miles northwest of the Morro at 10 o'clock, about which point they would have reached if they had sailed *very slowly* due west from the point 10 miles off Havana at 8.30, but 17 miles away from the Morro when they were captured. Just what courses and distances they sailed in that intervening time is a mystery in the case. Some time during the interval they probably made up their mind that they had been thwarted, and tried to get away in any direction, and then their conclusion would naturally be the farther to the northwest the better.

They also assert and reiterate the supposed conclusion, based upon the hypothesis of the *Newfoundland's* chart positions at 4 p. m. and previously being correct, the ab-

surdity and impossibility of the results as to courses and distances which they think the Navy story involves, and which their sketch at page 58 of their brief brings out, and claim that on this assumed state of facts they must all the time from 5.35 p. m. have been sailing farther and farther away from Havana on courses generally northwest. This theory is simply interjected into the case, and is an interesting pictorial view of something that does not belong in it and nothing else. The Navy testimony is clear and certain, viz, 7 to 8 miles offshore at 8.30, confirmed by the *Newfoundland's* own log; 17 miles from Havana and about the same distance offshore at the point of capture, and what was occurring on board the *Newfoundland* between 8.30 and the point of capture is still a mystery. The Navy witnesses do not profess to say. It is certain that the *Newfoundland* was not proceeding due west, because if she had been she would have been farther west than the point where she was captured at her normal rate of speed; and while she probably concluded at some time between 5.30 and 10 that the desired entry into Havana was impossible, and so have directed her efforts after 8.30 chiefly to getting away, and thus have been running when she was captured northwest or thereabouts, as we argue in the main brief, her offense had already been committed, and it should make no real difference that she was seized on the western rim of her circle of attempts and not east of a north and south line through Havana.

The *Newfoundland's* log, upon the verity of which the claimants base their chief reliance, but which they only bring forward now in a vague way, either was or was not

in the case below. If it was, it speaks for itself, and the importance of drawing upon its detailed facts for use in their brief is obvious. If it was not, and yet was of importance to them, they had an opportunity to introduce it below and did not avail of it, and therefore it is now to be received here with great caution, and that it proves what it is supposed to prove is not to be assumed as verity; and a reason is thus readily suggested why they did not choose to introduce it below or incorporate its assertions in their brief. Though there was no testimony from the *Hudson* showing where the two vessels were at ~~1 p. m.~~ 11 or 11:30 a. m. on July 19, when the *Hudson* boarded the *Newfoundland*, the mere statement that the *Newfoundland's* chart record of that point should be assumed as proved is not conclusive or satisfactory, and is not admitted. Now the log appears to have been an original exhibit in the case.

The appellants suggest (p. 4) that the *Mayflower* might have seen many other "faint lights," and that it was merely assumed that the faint light seen at 8.30 p. m. was the *Newfoundland*, and no other ship. But the night was clear, according to all the accounts; the Morro light was burning and was seen at a distance of 21 miles; the officers of the *Mayflower* were alert and vigilant at all times under their duty and the service they were performing, and especially so after 8.30 p. m. on this evening. They speak of no other lights, and do not intimate that there were other vessels in that neighborhood cruising about without the regulation lights, and it is fully evident that there were no other vessels of the blockading squadron in that immediate neighborhood at that particular time.

4. *As to certain authorities on "loitering."*

Beginning at page 67, the appellants' brief considers the doctrine of *cy près* approach and the right of neutral merchant vessels to come near or into blockading lines, and states the rule given by the writer on the law of nations, Bynkershoek, that vessels near a blockaded port may be seized, but their intent to enter must be beyond doubt. The Government contends, as the basis for the seizure and condemnation, that the intent to enter was beyond doubt; that all the circumstances showing a course of preparation are to be considered as establishing the intent; that the acts of this vessel constituted overt acts of carrying the intent into execution, and that an overt act, in the sense of a heading for the port of Havana and an open endeavor to run into the same, is not necessary in the case. It is to be remembered that the details of their run from Nuevitas west show that their speed was so regulated as to bring them a little east of Havana at dusk.

Concerning the effect of a false notice by a blockader, there was no such result of the *Badger's* warning as to reduce this neutral to the kind of distress referred to by Sir William Scott in the case of *The Henrick and Maria*, (1 Rob., 146). (Brief, p. 79.) The commander of the *Badger* honestly thought that there was a blockade of the entire coast, and told the master he could go west, but not to attempt to enter anywhere. All that the master had to say then was that his instructions were to enter Sagua or Caibarien, if not blockaded, but that his real destination was Kingston, and thereupon to turn round

and proceed to Kingston by way of Cape Maysi. And it is always to be remembered that the captain did not see the written instructions from the charterers to the former master and managing owner and claimant here. He says the instructions were verbally stated to him by Captain Farquhar; they were not left in his custody, and they have never appeared in the case (pp. 30, 31, 32, 85, 105).

The court below says nothing about superior education or makes any comparison on that subject between the claimants' witnesses and the Government witnesses. He speaks quite properly of the usual tests by which testimony is weighed, and especially of the effect of interest, and merely refers to the Government witnesses as men of education, character, and intelligence, whose testimony could not be discredited without imputing to them a reckless carelessness for which there is no warrant. That was not to impute to the other side any such carelessness; it merely brought out the fact, which is a fact in the case, that there was no interest at all on the part of the *Tecumseh's* witnesses, or any such interest on the part of the *Mayflower's* witnesses, as could be compared with the claimants' interest.

5. *As to certain decisions cited by the appellants concerning intent and the onus probandi.*

The claimants submit (p. 93) that suspicion of intention can not take the place of proof of acts. This was not a case of mere suspicious circumstances, such as *The Wren* (6 Wall., 582) or the other cases on that point which are cited. The intention was clear; it was defi-

nitely and distinctly shown by all the acts of the vessel from the time she was warned by the *Badger* at Nuevitas on. The intention, therefore, being clear, the knowledge of the Havana blockade undoubted, the fact of sailing with the intention makes the case upon the final facts as to the loitering about Havana, in view of the decisions as to *cy-pres* approach which are discussed in the main Government brief, entirely complete and convincing.

In *Fitzsimmons* v. *The Newport Insurance Co.* (4 Cr., 185), Chief Justice Marshall holds that even persisting in an intention to enter a blockaded port after a warning is not attempting to enter it; but this is said in the light of the fact, which is obvious from the opinion itself, that the intention in that case was evidenced by no fact whatever. Can that be said of this vessel's actions in this case?

The appellants draw a distinction on the well-established rule in prize by which the *onus probandi* of neutral interest rests on the claimant, between the mere question of the neutrality of the property, and the question of criminality. We do not understand upon what this distinction can be founded. It is true that condemnation in prize involves the accusation of guilt (in a general sense) and the plea of innocence, and that in condemnation for breach of neutrality the question is as to the innocence or guilt of the vessel. But neutrality forfeitures, like revenue forfeitures, are very different from proceedings in prize, which is a peculiar jurisdiction and subject to many rules different from ordinary legal rules. Proof of property, for instance, lies generally upon the claimant. (The Countess of Lauderdale, 4 Rob., 283.)

A prize proceeding is not to be regarded as criminal. Nor is there any foundation for importing into the case what claimants say is the uniform fundamental rule in all cases, civil or criminal, which places the burden of proof on the plaintiff. The rule about the burden of proof in prize is, as we have stated, just the other way, and, the vessel being seized and brought to adjudication, not only the burden of proof as to neutrality, but the burden of proof as to innocence of illegal intent or attempt, and as to good faith and the absence of fraud, clearly rests upon the claimants. (*La Amistad de Rues*, 5 Wheat., 385; *The Amiable Isabella*, 6 id., 1; *The Santissima Trinidad*, 7 id., 283; *Johnson* v. *Thirteen Bales*, etc., Fed. Cas. 7, 415.)

The contention that the *onus probandi* is on the claimants in all respects is suggested at least by statements in both the *Springbok* and the *Peterhoff* cases (5 Wall., 1, 22; id., 28, 62), namely, that frankness and truth are especially required of the officers of captured vessels when examined in preparation for the first hearing in prize, and that neutrals engaged in a commerce open to great suspicion are most strongly bound to frankness and good faith. And the same inference is to be drawn from *The Cornelius* (3 Wall., 214), in which it is held that "presumption of an intent to run a blockade by a vessel bound apparently to a lawful port may be inferred from a combination of circumstances, for example, * * * the fact that the vessel on her outward voyage was in the neighborhood of the blockaded place and within the line of the blockading vessels *by night;*" * * * and that, "although in such cases it is a possible thing that the

intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent." It is true that in the *Cornelius* Case there were other elements of suspicion which fortified the presumption.

From all these cases, we respectfully submit, the inference is plainly to be drawn that where any evidence of fraud or bad faith appears, the neutral claimant must repel it. (See also *The Bermuda*, 3 Wall., 514.)

Finally, upon this point, we submit that even if there is authority for the opposite contention we have fully shouldered the burden of proof in this case.

In conclusion we submit to the court certain decisions of Dr. Lushington during the Crimean war.

In *The Steen Bille* (Spinks's Prize Cases, 161), the question was whether the vessel was going to Stockholm, her proposed destination, or really to Riga, a blockaded port of the enemy. The court says:

> If this vessel was really going to Stockholm there was no breach of the blockade, and a knowledge of the blockade matters not. * * * Much evidence has been adduced to show that the place of capture was in the proper course to Stockholm. I am not convinced by this evidence, but do not mean to decide as if I wholly discredited it. This is abundantly clear, that, though it might be a proper course for Stockholm, it was also a proper course for Riga. How, then, am I to be satisfied as to which place the master was really conducting the course of his vessel? I must look to the whole of the evidence and see whether it is true and consistent—whether the master is deserving of credit or not.

The learned judge then compared the master's evidence with the log, showing that the ship was not going voluntarily to the northward or the westward (that is, it appears, away from Riga), but that the course was as near as she could possibly lie to Riga. The log in that case showed that the vessel was moving, when she did move, to the east and not to the west, which the captain explained by saying that while at the time of capture he was standing in rather far to the east, this was because he expected the wind to be wearing easterly and wanted to make the most of it when he again tacked. These and other facts as to the wind, affecting the vessel, of course, as a sailing vessel, no doubt influenced the court largely in the view that the master was discredited by his own log and his own statements; and the court also found as a fact that there was a letter on board which went further to show not only a mere doubtful destination, but the forbidden destination, and this makes that case so far stronger than the present one. The court then concludes:

> I can not entertain any reasonable doubt that the vessel was going to Riga in breach of blockade; and the steps which have been resorted to in order to conceal the true destination perfectly satisfy me that all parties were cognizant of the blockade. Of course I must condemn the ship.

In the case of *The Union* (id., 164), a Danish vessel was captured off Lyser Ort, at the entrance of the Gulf of Riga, alleging an intention to make inquiries whether the port of Riga was blockaded, and if so, to go to a neutral port. This affects the intention in the present

case as to Sagua la Grande and Caibarien. The opinion of Dr. Lushington says:

> They chartered a vessel for Memel, and being uncertain whether Riga was blockaded or not, they sent her to Riga; or, according to another version, to inquire of the blockading force whether Riga was blockaded. Is this justifiable? Under particular circumstances perhaps it may be justifiable, where information can not be otherwise procured, to inquire of the blockading force; but how can that excuse prevail in the present case? Where was the difficulty of inquiring at Memel, a neutral port, which lay in the very track, and to which port this vessel was, according to one account, primarily chartered? The owner, indeed, swears that the vessel could not inquire at any neutral port without great expense and loss; but I must be excused from giving credit to a statement which is not justified by the undoubted facts of the case.

The court evidently agrees with the established view that the law does not permit such an inquiry, because, after considering other features in the case and the ambiguous clearance, which showed the neutral port to be in reality a false destination, the opinion adds:

> Even if justified in the course he adopted, he has not honestly pursued it; if candid, the destination on the papers ought to have been, "to Riga, and, if blockaded, to Memel." Such would have been honest, *even if the law had not permitted it.*

And the judgment in the case was also undoubtedly affected by the palpable contradictions as to destination, shown by letters on board. It is true that one of the destinations thus shown was the clearly forbidden one,

Riga; and here, though the destinations are clearly contradictory, the interdicted port of Havana does not appear upon the face of the papers.

We therefore respectfully submit, in reply to the appellants' brief (in which there is perhaps an excess of indignant and protesting disclaimer and assertion that this was a gross trespass without probable cause), that the decree below was properly entered, and that the court should affirm the same, with costs.

HENRY M. HOYT,
Assistant Attorney-General,
For the United States.

JOSEPH K. MCCAMMON,
JAMES H. HAYDEN,
For the Naval Captors.

THE NEWFOUNDLAND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 156. Argued November 3, 6, 1899. — Decided January 15, 1900.

The question in this case is as to the adequacy of the proof offered on behalf of the Government and the captors to show that the Newfoundland was trying to violate the blockade of Havana, and the court is of opinion that it does not attain to that degree which affords a reasonable assurance of the justice of the sentence of forfeiture in the court below — that it raises doubts and suspicions and makes probable cause for the capture of the ship and justification of her captors, but not forfeiture.

THE case is stated in the opinion of the court.

W. Theodore G. Barker for appellants. *Mr. G. A. R. Rowlings* was on his brief.

Mr. Assistant Attorney General Hoyt for appellee. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, for the naval captors, were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Newfoundland, a British steamship, was seized off the coast of Cuba on 19th July, 1898, by the United States ship of war Mayflower, on the ground that she was trying to violate the blockade of Havana. She was sent to Charleston, South Carolina, and there libelled with her cargo as prize of war. Testimony was taken *in preparatorio*, and the court determined it to be insufficient for condemnation, and on motion of the attorney for the United States ordered further proof.

Upon that proof a decree was entered condemning and forfeiting the ship and cargo, and they were ordered to be sold. From the decree this appeal is prosecuted. The assignments of error may be reduced to two contentions:

1. That the court erred in making an order for further proof because the testimony taken *in preparatorio* afforded no legal foundation for doubt, or proof of any overt act to justify the condemnation of the ship.

2. That the additional testimony taken still left the evidence insufficient for condemnation.

(1.) Of the testimony taken *in preparatorio* the court said:

"Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the Newfoundland, at the time of capture or at any other time, was heading for the port of Havana or any other port."

And further:

"So far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts as is presented in this record. How far

short the cases cited fall in showing cause for condemnation, the circumstances hereinabove recited demonstrate. These circumstances do no more than create a suspicion that there was an intention to enter a Cuban port in violation of the blockade; but suspicion, however well founded, is not proof, and cannot be accepted in any court in place of evidence.

"There must be some overt act denoting an attempt to do the thing forbidden, some fact in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution.

"As this court has in a recent case had occasion to remark, the testimony *in preparatorio* rarely affords opportunity for such proof. From the master's testimony it appears that Commander Mackenzie informed him that he had information, through a letter from the American consul at Halifax, that the Newfoundland sailed with intention to run the blockade. The court can form no opinion as to the probable weight of such testimony. It also appears that Commander Mackenzie thought the movements and conduct of the Newfoundland on the night of the capture suspicious. The court has personal acquaintance with Commander Mackenzie, and knows that in character, intelligence and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof; it furnishes ground for ordering further evidence."

It is urged by counsel for appellants that the court, therefore, based its order for further proof upon Commander Mackenzie's opinion, which, even if otherwise competent, was not in evidence. We, however, do not so interpret the remarks of the court. It is explicitly stated that the circumstances created a suspicion of an intention on the part of the ship to enter a Cuban port, but that the suspicion was insufficient for condemnation without some proof in addition showing an overt act, which, as testimony *in preparatorio* rarely afforded, further proof was ordered.

This was not an abuse of discretion, and is clearly within the ruling of *The Sir William Peel*, 5 Wall. 517, 534. In that case the court said the preparatory proof, which con-

sisted of the depositions of the master of the ship, the mate and one seamen, "clearly required restitution" of the ship, and, declaring the rule, said, through Chief Justice Chase, that "Regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.

"If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

(2.) For a statement of the case we may quote from the opinions of the District Court. They clearly marshal and review all inculpating and exculpating circumstances, and give the impressions of the court of the character of witnesses the most important of whom testified in its presence. From the first opinion rendered on the testimony taken *in preparatorio* as follows: The Newfoundland "cleared from Halifax, Nova Scotia, July 8, 1898, for Kingston, Jamaica, and Vera Cruz, Mexico. She carried a cargo of flour, pork, corn, wheat and canned goods shipped by David Robertson & Co. Bills of lading were issued to them for 4386 packages for Kingston, and 3747 for Vera Cruz. These bills of lading are indorsed by them in blank. The charter party was for a voyage of three months to ports of the United States, West Indies, Central and South America, etc., in the customary printed form, and written therein was 'including open Cuban ports, no contraband of war to be shipped,' and was to terminate at Halifax. Musgrave & Co. were the charterers.

"It appears from the master's testimony that he was instructed by the charterers to follow the directions of the shippers of the cargo, and he received from Robertson & Co., through the former captain, verbal instructions to clear for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba, and to enter either the port of Sagua la Grande or Caibairien, but on no account to enter any

blockaded port, and if he found the ports of Sagua and Caibairien blockaded, to proceed to Kingston and wire for instructions. It seems clear from this testimony that it was the intention of the shippers that the cargo was to be landed at Sagua or Caibairien, where the master was instructed that he would be met by pilots, and that Kingston and Vera Cruz were 'contingent' or provisional destinations. Neither Sagua nor Caibairien were included among the Cuban ports in either of the President's proclamations notifying a blockade.

"The Newfoundland sailed from Halifax on July 9. Her speed is about eight knots; her registered tonnage, 567 tons. She steered for the 'Crooked Inland Passage' in the Bahamas. Passing thence into the 'Old Bahama Channel' and going in the direction of Sagua and Caibairien, she reached a point northwestwardly from Neuvitas, on the north coast of Cuba, where she was stopped by the United States ship of war Badger at 12.45 A.M. on Monday, July 18. Her papers were examined by the boarding officer, who informed the master that the whole island of Cuba was blockaded, and was allowed to proceed upon her course.

"The island of Jamaica lies almost due south from Neuvitas, which, being about two hundred miles from the eastern end of the island of Cuba, it is contended that the Newfoundland should at that point have changed her course and proceeded eastward around Cape Maysi and thence to Kingston. This, undoubtedly, would have been the shortest course, and if Kingston was the destination the sailing westward from Neuvitas would have carried the ship many hundreds of miles out of her course. It may be here observed that on the log book kept by the mate the line at the head of each page up to and including Monday, 18th July, is 'Journal from Halifax, N. S., towards Kingston and Vera Cruz.' On Tuesday, 19th July, the head line is 'Journal from Halifax, N. S., towards Vera Cruz and Kingston.' If after reaching Neuvitas there was an intention to go to Vera Cruz, the westwardly course would be the most direct."

From the second opinion on final hearing, as follows:

"Lieutenant Evans, in command of the U. S. S. Tecumseh

testifies that about 5 o'clock in the afternoon of July 19, while on his station in the first blockading squadron, six or eight miles to the north and eastward of Havana light and about three and a half miles from the nearest shore, he sighted the Newfoundland moving towards him on a westerly course; that he immediately stood towards her at full speed, about ten knots, and overhauled her, sending his mate aboard to examine her papers. He estimates his position at the time as being latitude 23.15 north; longitude 82.13, and on a diagram prepared by the navigating officer of the Mayflower, and offered in evidence, he fixes her position as being unquestionably within a dotted circle; thinks that it was about the centre of the circle, but having taken no measurements at the time would not undertake to fix it closer than within three miles. He fixes the hour of boarding at 5.35, and says that he left her 'in the vicinity of 6 o'clock,' she bearing off on a course about west by half north. Mate Nickerson, of the Tecumseh, fixes her position at the time of sighting the Newfoundland at six to eight miles from Morro light and about three and a half to four miles from the nearest shore, the Newfoundland being at that time about nine miles to the northward and eastward, sailing west, the Tecumseh sailing about four miles to overhaul her. He fixes the hour of boarding at 5.35 exactly, and says that he returned aboard his ship about 5.50. He failed to enter upon the log of the Newfoundland the hour of boarding, as is usually and always should be done. He locates the point of boarding upon the diagram as does Lieutenant Evans; saw the Newfoundland for about ten minutes after she stood off one or two points to the north of west, and says 'it began to settle down dusk then.'

"Ensign Pratt, of the Mayflower, whose watch began at 8 o'clock, testifies that about 8.20 he picked up a small light bearing north by west from him; reported the same to the commanding officer, who ordered the ship headed for it north by west and the engines rung ahead full speed. Shortly after heading for it the light was lost, but, standing on the same course about twenty minutes and putting on forced draft, the light was picked up again a little to the westward. Altering

his course and heading north-northwest, the light shortly disappeared again. He gradually changed his course to the westward until he headed about northwest, standing on that course about thirty minutes, still not seeing the light, when, about 9.10, he sighted it again, bearing southwest on his port beam and inshore; headed for it again and stood on until about 9.30, when the light was seen outshore of him on his starboard beam, and headed for it again and came up with her at 10 o'clock. From subsequent developments it is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland, visible only when nearly abeam through the doors on either side. It would be open only to about three fourths of a point of the compass, and the Mayflower at full speed, making at times sixteen miles an hour, would pass the point of visibility, until by changing her course it would again become visible and be picked up, first on one quarter, then on the other. When the light was first seen the Mayflower was heading east-northeast and the light was bearing north by west from her, a point forward of the port beam, and estimated to be from two to three miles distant. No other lights were seen on the Newfoundland until she was overhauled. At that time all of the regulation lights were found to be burning brightly.

"Lieutenant Culver, navigating officer of the Mayflower, describes the chase substantially as above, and exhibits a tracing made on July 20, showing the estimated positions of the respective vessels at the time when the light was first discovered and at the time of the capture and the course sailed by each.

"Commander Mackenzie, of the Mayflower, was the senior officer of the blockade off Havana. The Mayflower covered about five points of the compass on the bearing from Morro light, and had been on that station during the month of July. He says that about 8.30 a faint light was reported about north by west of him, which he thought was a plain lantern. He describes the chase and locates the positions of the two vessels on the tracing prepared by Lieutenant Culver. From this

testimony and upon this diagram it would appear that the Newfoundland when boarded by the Tecumseh was at a point within a circle whose centre is ten and three fourths miles from Morro light, whose bearing was southwest one half west.

"The testimony from the Newfoundland relating to the same matter will now be stated.

"Captain Malcolm, the master, says that he was boarded by the mate of the Tecumseh fourteen miles off shore — off the nearest land — while sailing on a westward course; that the boarding officer, after examining his papers, advised him not to go any nearer the land lest he should get a shell into him, and left him at 6.30; that thereafter he stood on a course one point north of west until 8 o'clock, when the Havana light bore about south by west, and from that time he put his ship back on a course due west, which he followed until boarded by the Mayflower. He exhibits a chart, on which he has marked his course, and says that at 8.30 he passed Havana light, being seventeen and one half miles from it; that at 10 o'clock, when boarded by the Mayflower, he was twenty-one miles from Havana light, which bore then southeast by south half south.

"Salkus, the mate of the Newfoundland, testifies to the boarding by the Tecumseh at 6.10, and that the Havana lighthouse and Morro Castle were not visible; that they started on their course at 6.30, and at 8.30 were abreast of Havana light, which bore south about sixteen or seventeen miles. In explanation of the entry in his log he says that he took no bearings at the time of the entry, and knew that the ship was farther off than ten miles. He says that at the time of the capture Morro light was not visible from the bridge, but that he saw it from the compass pole, fifteen feet above the bridge.

"Payne, the engineer, testified to the boarding by the Tecumseh at 6.10, and his log contains an entry showing that the engines stopped at 6.10 and started again at 6.30.

"It thus appears that there is a wide divergence in the testimony as to the point at which the Newfoundland was when boarded by the Tecumseh, and some divergence as to the time of such boarding.

"Lieutenant Evans and his mate fixed this location within

a circle whose radius is three miles. They say that they are certain as to her location within three miles, and believe that she was about the centre of that circle, which is ten and a half miles from Morro light. Captain Malcolm and his mate fix the location at a point twenty-four miles from Morro light, thirteen and a half miles from the centre of the circle above referred to, and ten and a half miles from that point of the circle nearest to the Newfoundland.

"There is a marked discrepancy, and the first point to be decided is which is correct. Applying the usual tests by which testimony is weighed — the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds — there can be no doubt that there is a preponderance of probability in favor of that side which, having no interest in the controversy, has the greater opportunity of knowledge.

"Lieutenant Evans and his mate were on cruising grounds with which they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night. They were within three or four miles of the shore, with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education, character and intelligence, and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

"Neither Captain Malcolm nor his mate were familiar with the locality; the former had once before been to Havana; the latter, never. Their interest is obvious. I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the Newfoundland within the described circle when boarded by the Tecumseh. I am not so clear as to the time. The mate Nickerson fixes it at 5.35 precisely, and says that he returned to the Tecumseh at 5.50, but he says that he watched the Newfoundland for about ten minutes after she left, when 'it began to settle down dusk.'

"The sun set in that latitute on that day about 6.30, and there is little twilight.

"The officers of the Newfoundland fix the hour of boarding at 6.10 and the time of departure at 6.30, and these figures are entered upon the engineer's log. This log has been in possession of the claimant since the capture, and some erasures appear in another part which may hereafter call for comment, and it therefore cannot be accepted as absolute verity; but giving the ship the benefit of the reasonable doubt which the testimony warrants, assuming that she sailed at 6.30, she is next seen by Ensign Pratt about 8.20, when he sighted a small light bearing north by west from the Mayflower, whose station on the cruising ground lay next west of the Tecumseh, and whose position at that time was about six miles north by west from Morro light. This small light was estimated to be about two or three miles from the Mayflower. The mate of the Newfoundland made this entry upon her log: '8.30, Havana light bearing south ten miles.' If this testimony is taken as true, this would place the Newfoundland at a point seven miles from the centre of the circle adopted as the point of departure, and ten miles from the extreme western circumference of it, and it would follow that she had consumed two hours in making that distance. As her speed during her voyage was on an average nearly eight knots an hour, there is a considerable margin of time to be accounted for, which she endeavors to do by fixing her location at 8.30 at a point seventeen miles from Havana. This is the testimony of her master, and the mate concurs in it, saying that the entry in his log was not an accurate statement of the ship's position at that time; that it was only intended to show that she was at least ten miles from Havana light. It is not necessary to discuss nor decide now how far a ship is concluded by the entries in her log. If the party making such entry is shown to have been drunk at the time or habitually careless, or if made in a perfunctory way, without observations or the opportunity of observation, little weight might be given it; but the log being intended to be a correct record of the facts contained therein, an entry made with full knowledge and opportunity of ascer-

taining the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed. If it is the result of a mistake, there must be conclusive evidence of the mistake. It is sufficient to say that such evidence has not been adduced here, and the entry upon the log, confirmed as it is by the testimony from the Mayflower, fixes the position of the Newfoundland at 8.30 at a point about ten miles from the Havana light. From that point to the point of seizure her course can be marked with sufficient accuracy. That she sailed on a straight course from 8.30 to 10 o'clock, and that such course led her away from the entrance into the port of Havana, is entirely clear, whether the point was seventeen miles from Morro light, as claimed by the Mayflower, or twenty-one miles, as claimed by the Newfoundland, or eighteen miles, as agreed upon by her master and Ensign Pratt as the point from which they took their departure after the seizure, when they started upon their voyage to Charleston.

"The next incriminating charge is that the Newfoundland was sailing without lights. Ensign Pratt, who first sighted her, says he picked up a small light. All the witnesses from the Mayflower describe this light as that from an ordinary lantern, and not the masthead light. None of these witnesses saw any of the regulation lights until they came up with her, about 10 o'clock, when they were all brightly burning. After the chase began these regulation running lights, being visible only two points abaft the beam, would naturally not be seen.

"Coming westward from the point where she left the Tecumseh to the point where the faint light was sighted, her masthead light, whose visibility by the regulations is at least five miles, should certainly have been seen if there was proper vigilance aboard the Mayflower. That Ensign Pratt was vigilant is demonstrated by the fact that he picked up the dim light two or three miles off at 8.20. He went on duty at 8 o'clock. The officer who had the watch before that hour was not examined, nor were the lookouts, who are described by Commander Mackenzie as uncommonly efficient men. As it is, the testimony leaves this question open to reasonable

doubt. While it is probable that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of visibility.

"The witnesses from the Newfoundland, including the sailor who lit them, all testify that the lights were lit at the usual hour and they were all burning when she was overhauled.

"Commander Mackenzie and other witnesses from the Mayflower all testify that the small light already described was the only one seen; that there were no stray lights, such as are commonly seen aboard a steamer in the night time.

"Taking the point of departure to be somewhere within the circle already described and the time of departure at 6.30 and the rate of speed at nearly eight knots, and following the courses described — west by north until 8 o'clock, and then due west until 10 o'clock — and plotting it upon the chart, I must conclude that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the Mayflower as the point of capture at 10 o'clock, unless she had loitered somewhere upon her route.

"Outside the domain of the exact sciences, absolute certainty is rarely attainable, and there must always be an element of doubt as to every transaction the proof of which rests upon fallible human testimony, nowhere more fallible than in estimates of location and distances upon water.

* * * * *

"We will now look into the character and conduct of the Newfoundland to see whether her presence off Havana is consistent with innocent intent.

"She is a small steamship, lately employed in the sealing business. She sailed from Halifax, July 9, loaded with a cargo of provisions, under command of Captain Malcolm, who was employed for that voyage. She had two clearances, one for Kingston and one for Vera Cruz. Commander Mackenzie testifies that it is not the practice of any American custom house to give two clearances. Captain Malcolm says that this

is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had cargo for each. We have no statute prescribing any regulation on this subject, and wherever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port to give such separate clearances. While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of grave and just suspicion that her real and primary destination was to neither of those ports, as subsequent events proved. Captain Malcolm, in his testimony *in preparatorio*, said that his verbal instructions were to sail for Caibairien or Sagua la Grande, and if those ports were blockaded to go to Kingston and cable for orders. For reasons, into which it is not the province of this court to inquire, neither Sagua nor Caibairien were included among the ports blockaded under the proclamation of the President, and he had the right to go to either. Whether in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry, certain it is that he would have committed no offence cognizable here.

"Taking his course to the southward, he next appears off Neuvitas, where he is boarded by Lieutenant Titus, of the U. S. S. Badger, and is informed by him that the whole coast of Cuba is blockaded. The case is not presented in an aspect which requires any determination of the question whether that sort of a blockade was effective or legal, as he did not go to either Sagua or Caibairien for the purpose of testing its validity, which he might well have done. According to his testimony *in preparatorio*, and it is repeated on this hearing, he abandoned all thought of entering either of those ports upon hearing that they were blockaded. His course, then, should have been around the eastern end of the island of Cuba to Kingston, by way of Cape Maysi, for the course around the western end, by Cape Antonio, was nearly a thousand miles further. In these days of sharp competition intelligent

men do not make such long detours in the prosecution of legitimate business. The explanation given is that he wanted to satisfy his charterers by showing them that he had passed by the port to which he was directed to go, and, further, that he apprehended that he would subject himself to suspicion by changing his course at that time. The answer to this is obvious. His charterers did not instruct him to go by the ports of Sagua and Caibairien, but to go to them, and if he did not intend to do that his proceeding in that direction was such a futile, time-consuming and coal-consuming venture that it staggers credulity to accept it as the true reason; nor does the other reason given seem much more satisfactory. There was nothing unlawful in his setting out for Sagua or any other open port in Cuba, and if, after information of the blockade, it became necessary to change his course in order to go by the shortest route to Kingston, his contingent destination, there would have been no risk in disclosing the truth. In this, as in most of the affairs of life, the straightforward course would have been the wisest course. That it was not taken suggests the conclusion that neither Sagua nor Caibairien was the real destination. It appears from the testimony that neither at the time of capture nor afterwards was anything ever heard about Sagua or Caibairien until it came out in the examination of Captain Malcolm before the prize commissioners. None of the other officers of the ship appear to have known about it. The mate seems to have thought that they were going to Vera Cruz. In the engineer's log there appears every day from July 9th to July 18th, inclusive, a line at the top of the page containing the words, 'from Halifax to Vera Cruz and —— Cuba.' The word 'Kingston' is written over and partially obliterates the word 'Cuba.' There is a blank space before the word 'Cuba,' evidently intended to be filled in. 'Havana' would about fill it. The engineer appeared to be the most intelligent man on the ship after the master. From the entry on his log it is plain that he knew that the ship's destination was Cuba, and there would seem to be no good reason why the name of the port should have been left blank if it was Sagua or any other open port. In the

absence of any testimony confirming the master's statement that his instructions were to go to Sagua or Caibairien, and there being nothing in his conduct showing that that was his real destination, I must hold it to have been a pretensive destination, and his appearance before Havana is therefore not satisfactorily explained.

"Lieutenant Culver, of the Mayflower, who boarded her, says that when he asked Captain Malcolm where he was bound he was very vague in his replies, sometimes saying Kingston and sometimes saying Vera Cruz, and when asked whether he was shaping his course by way of Cape San Antonio he replied that he hadn't made up his mind. In the same conversation he said that he had been making eight knots an hour from the time he was boarded by the Tecumseh to time of overhauling. To Commander Mackenzie, on the Mayflower, he said he was making for Vera Cruz, if he had coal enough, and then to Kingston. If he did not have enough coal, he was going to Kingston in order to take on coal. To Lieutenant Pratt, the prize master on the voyage up to Charleston, he said that he was bound for Vera Cruz.

"Captain Malcolm says, in his testimony, that his instructions were to go to Kingston if he found the ports of Sagua and Caibairien blockaded, and from there he was to cable for instructions, and that Kingston was his destination; that he had plenty of coal to get to Kingston, but not enough to go to Vera Cruz and then Kingston.

"It must be conceded that there is no proof of any attempt to enter the port of Havana — that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartung, the cases relied on by the government."

The application of a more stringent rule to the Newfoundland than was applied in those cases was justified by the court on the ground that steam vessels have greater power of eluding blockades than sailing vessels possess.

The conclusion of the court was that the evidence estab-

lished that the ship was loitering about the coast seeking an opportunity to violate the blockade. Conceding, *arguendo*, that this was enough for her condemnation, we think the fact is very disputable. It is based upon the ship's nearness to the coast, the slowness of her movements deduced from her position when the Tecumseh boarded her and when the Mayflower captured her, and the taking of a longer route to Kingston than might have been selected.

These circumstances may be explained consistently with innocence. Against them the fact remains that she made no attempt to enter any Cuban port. She sailed by Caibairien. She sailed by Sagua, although a railroad connected it with Havana, and made it inviting to contraband enterprise. And she had sailed beyond Havana when she was captured. But it is argued she must have loitered, and with guilty intention because she ran only twelve miles in three hours, when she ought to have run twenty-four miles.

In this conclusion there are disputes of fact as well as disputes of inference. It depends upon the time it was and where she was when the Tecumseh boarded her — the time it was and where she was when the Mayflower seized her; and granting a decision of these as contended for by the Government, there are the elements of a varying course in the night and the retarding influence of the current to account for the time.

The fact of going around Cuba to Kingston instead of turning back after she was boarded by the Tecumseh, is from our present view not completely accounted for. But our situation, it must be remembered, was not Captain Malcolm's situation. It was his view, he testified, of his duty to his employers. It was his way to avoid exciting the suspicion of the officers of the Tecumseh; and, in another place, without peril or responsibility for that or some other decision, we are not prepared to say that it is necessarily proof of guilt. After experience it is often easy to see that something else should have been done than that which was done, but judging Captain Malcolm in his situation, was there not presented to him a fair conflict of reasons? It is very certain, if doubt came to him what

to do, he would avoid the hazard of the seizure of his ship at the comparatively small sacrifice of the coal and time which would be consumed by going to Kingston the longer way.

It is further urged that when the Newfoundland was seen and pursued by the Mayflower she had not her usual lights displayed. This, the District Court said, the testimony left in reasonable doubt. "While it is probable," it was said, "that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of possibility." The limit was as narrow to all other officers of the pursuing vessel and the possibilities it afforded must be considered as at least balanced by the positive testimony of all on board of the Newfoundland, including the sailor who lit them at the usual hour, and the fact that they were all burning when she was overhauled.

But it may be said that the ship has too many suspicious circumstances to account for, and that we overlook the probative strength arising from their number and their concurrence; that if each one standing alone can be explained, all together unerringly point to the guilt of the ship. We appreciate the force of the argument, but cannot carry it so far. And yet we have no desire to impair the effectiveness of blockades by declaring a more indulgent rule than that of prior cases nor permit experiment with opportunities to break into blockaded ports. But there should be some tangible proof of such intention — a more definite demonstration than this record exhibits. As we have already seen, the learned trial judge was constrained to say "that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartwig, the cases relied on by the government. Their application, however, to the case at bar, whose facts "fall far short" of their facts, is insisted on because of the difference between the power of steam vessels and the power of sailing vessels. Undoubtedly there is a difference, but if steam has increased the power of blockade runners, it has increased in greater degree

when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective. *The Olinde Rodriguez*, 174 U. S. 510.

The question in this case, then, is as to the adequacy of the proof, and we do not think it attains that degree which affords a reasonable assurance of the justice of the sentence of forfeiture. It raises doubts and suspicions — makes probable cause for the capture of the ship and justification of her captors, but not forfeiture. *The Olinde Rodriguez, supra.*

It follows, therefore, that the decree of the District Court must be reversed and the cause remanded, with directions to enter a decree restoring the vessel and cargo, or if they have been sold, the proceeds of the sale, but without damages or costs, and it is so ordered.